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The Second Part
OF
REPORTS
OF
CASES

Taken and Adjudged in the
Court of Chancery,

FROM
The 20th Year of King *Charles II.*
TO THE
First Year of Their present Majesties,
King *William* and Queen *Mary.*

BEING
Special CASES, and most of them
Decreed with the Assistance of the Judges, and
all of them referring to the Register Books,
wherein are settled several Points of Equity,
Law and Practice.

To which is added,
The late Great CASE between the Dutches of
Albemarle and the Earl of *Bathe.*

L O N D O N :
Printed by the Assigns of *Richard* and *Ed: Atkyns*, Esquires;
for **John Walthoe**, and are to be sold at his Shop
in *Vine-Court, Middle-Temple.* MDCXCIV.



THE
PREFACE
TO THE
READER.

THE Favourable Entertainment which the First Part of these Reports met with at your Hands, hath encouraged me to Present the Remainder of them to Your perusal: The acceptance whereof I shall not much doubt, when I consider that besides the Charm of Novelty, the Cases were heard and decreed with great Deliberation and Solempnity in our own times, by Persons very Eminent and Famous in their Professions, and upon that account they bear with them their own Letters of Recommendation. For I cannot imagin, that the *Chancery* Causes, which, if of any considerable weight (as usually they are) being generally

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rally mixt with Law, should receive a closer and more satisfactory Determination, when they are Pronounced from a Clergy man or a bare States-man, than from one of that Honourable Profession.

To render them the more intire, I have abridged the great Case of the *Duke of Norfolk*, which hath solidly settled the perplexed Points of Perpetuities: It is true, The Lord Chancellor *Finch* differed in Opinion at that time from the Learned Judges, and he was in pain to do it; yet certainly there is no Common Lawyer, (let him Espouse his Notions never so dearly) but must both admire and acquiesce in the Equity of that Case.

I have added an Abstract of the famous Case of *Com^r Mountague contra Com^r de Bath*, with the Judges and Lord Keeper's concurrent Opinions, and their Reasons briefly recited; but that Cause by Appeal now depending before the Highest Judicature in the Nation, and waiting the Decision of the Honourable House of Peers, I do not think fit to mention more of it.

In many other excellent and useful Cases here Reported, tho' they have been Argued and decreed in a Court of Equity, yet a Common Lawyer may find many Points agreed and settled to good satisfaction, respecting those two great Cargoes
of

The Preface.

of Law-business; WILLS and SET-
TLEMENTS.

But Lastly, to obviate an Objection which causeth some quarrel with us; How comes it to pass, that after such frequent and solemn arguing of Causes, in all their Niceties and Circumstantials, that Decrees are so often Revers'd by succeeding Chancellors? I must Reply to this, as that Learned Chancellor did in the above mentioned Case of the *Duke of Norfolk*. *I must be saved by my own Faith, and must not Decree against my own Conscience and Reason.*

Besides by a further Penetration into the Series of Transactions, the Intentions of the Parties and the like, perhaps something may arise which was not thought of, or not thoroughly considered. But the true and main Cause of the variety of our Opinions is, the Natural Imperfections of our Faculties: Uncertainty even in our own Judgments, is incident to our Nature. And I cannot express my Notion better, than in the bold Words of that Ingenious Canonist Gomez, in *Regula de Triennali possessore*, cap. 5. *Non est inconueniens iudicium esse uno tempore iustum & postea ejus contrarium iustius. Et hoc malum imponi videtur mortalibus in pœnam, ut eorum Opiniones secundum varietatem temporum senescant & inarriorantur.*

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aliaq; diversæ renascentur & deinde pubescant. Talis enim est humani juris disciplina, ut nulla in ea Opinio eodem statu diu stare possit. Dies diei eructat verbum, & nox nocti indicat scientiam.

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*Books lately Printed for John Walthoe, in
Vine Court, Middle-Temple.*

AN EXACT Table of Fees, of all the Courts at *Westminster*, as the same were by Orders of the several Courts carefully Corrected and diligently Examined by Records and Ancient Manuscripts, by the Persons following: *Viz.* The CHANCERY, by Sir *Miles Cooke*, *Samuel Keck*, Esq; and others. The KINGS-BENCH, on the Plea-side, by *W. Turbill* and *Nicholas Harding*: On the Crown-side, by *R. Seybard* and *Richard Horton*. The COMMON-PLEAS, by *W. Farmerie*, *Silv. Petyt* and *H. Clift*. The EXCHEQUER: On the Plea-side, by *R. Beresford*, *Tho. Arden*, &c. On the Equity-side, by *Butler Buggins*, Esq; Very useful and necessary for all Attorneys, Solicitors and Entering-Clerks; and indeed for all Persons that have any Business of moment. To which is added a Table, for the ready finding out the Fees belonging to each Office.

2. Reports of Cases Taken and Adjudged in the Court of *Chancery* in the Reign of King *Charles the First*, and to the 20th Year of King *Charles the Second*. Being Special Cases, and most of them decreed with the Assistance of the Judges, and all of them referring to the Register-Books. Wherein are settled several Points of Equity, Law and Practice. To which are added Learned Arguments relating to the Antiquity of the said Court, its Dignity and Jurisdiction.
3. Obser-

3. Observations Historical and Genealogical ; in which the Originals of the Emperor, Kings, Electors, and other the Sovereign Princes of *Europe* ; with a Series of their Births, Matches, more Remarkable Actions and Deaths. As also the Augmentations, Decreasings and Pretences of each Family are drawn down to the Year 1690.
4. The Law of Obligations and Conditions; or an acurate Treatise, wherein is contained the whole Learning of the Law concerning Bills, Bonds, Conditions, Statutes, Recognizances and Defeazances ; as also Declarations on Special Conditions, and the Pleadings thereon, Issues, Judgments and Executions, with many other useful Matters relating thereunto, digested under their proper Titles. To which is added a Table of References to all the Declarations and Pleadings upon Bonds, &c. now extant.
5. A compendious and acurate Treatise of Fines upon Writs of Covenant, and Recoveries upon Writs of Entry in the Post ; with ample and copious Instructions how to draw, acknowledge and levy the same in all Cases. Being a Work performed with great Exactness, and full of Variety of Clerkship. The Third Edition enlarged.

REPORTS

REPORTS AND CASES

Taken and Adjudged in the
COURT of CHANCERY

In the REIGN of
King CHARLES II.

Every contra Gold, 20 Car.2. fo.921.

THE Bill is to be Relieved for two Legacies of 1500 *l.* apiece, which the Plaintiff claims as Administratrix to her Daughters, *Susanna* and *Martha Every*; given and secured to them by several Conveyances, and by the last Will of *William Every* their Grandfather.

B

The

Portions
raised by
Deed.

The Case is (*viz.*) That the said *William Every* the Grandfather, in consideration of a Marriage between *William Every* his Son and the Plaintiff *Martha*, a Daughter of Sir *John Pool*, by Deed 22 April, 7 Car. 1. did provide, That if *William* his Son should die without Issue male by him on the body of the said Plaintiff *Martha*, and should have two Daughters by the Plaintiff *Margaret*, then living; or if the said *William* should fail to have issue Male which should be living, until the same Daughters should respectively attain 18 years of Age, or be married, that then the Recoveror therein named should stand seised of the Premises, to the use of the Recoverors and their Heirs, for the raising 1500 *l.* apiece for the Portions of the said Daughters, and 20 *l.* a piece *per annum* for each of their Maintenance in the mean time, to be paid at their respective Ages of 18 years or days of Marriage, which should first happen; and if either of the said Daughters should die before that Age or Marriage, the Portion of her so dying to be distributed to the Survivor; and if all the said Daughters should die, their Portions not paid or payable, then the same should be paid to the next Heir of *William Every* the Grandfather.

That

That *William Every*, the Son, had Issue New Provi-
 by the Plaintiff one Son named *William*, sion by a se-
 and two Daughters, the said *Susan* and cond Deed;
Martha, and by Deed of Bargain and Sale, and a Will
 and Release thereupon, both dated in thereupon.
December, 1651; in which Release, so
 much of the Tripartite Indenture as re-
 lates to the Daughters Portions is recited.
William Every, the Grandfather, Conveys
 to *Gold*, *Doble* and *Holloway*, and their
 Heirs, Lands in *Somersetshire*, to the use of
William the Grandfather for life, and after
 to *Gold*, *Doble* and *Holloway* for 200 years,
 with other Remainders over upon Trust
 out of the Profits, or by granting Leases
 or Estates to pay his Debts first; and
 then for raising to and for the said *Susan*
 and *Martha*, so much Mony as should
 supply and advance their respective Por-
 tions, to them severally thereafter to be
 given by *William* the Grandfather, either
 ready Mony or otherwise, to be limited
 by any act thereafter to be executed in his
 life time, or by his last Will, to the Sum
 of 1500 *l.* apiece, together with 20 *l.* per
annum, until the said 1500 *l.* apiece should
 be paid unto them; the same to be in satis-
 faction of all Moneys that they might
 claim by force of the said Indenture Tri-
 partite, with *Proviso*, That if the said
William the Grandfather should, by Will
 or otherwise, appoint them 1500 *l.* apiece,

or 1500*l.* to the survivor of them, for their Portions with such yearly Maintenance, as aforesaid, so as the same should be well and truly paid unto them accordingly: Or, if before such portions should be paid, the said *William Every* their Brother should die without Issue Male, whereby the said premisses should be charged for raising of Portions and Maintenance aforesaid; that then the Trustees should not levy the Portions by that Indenture limited, other than what should be paid in the life time of *William Every* their Brother. And it is thereby declared, that in case the said *Susanna* or *Martha*, or either of them, should die before their Portions (in and by the said last Indenture to them limited) should become due and payable to them, that then the said portion and portions of them or either of them so dying, should not go or be to the survivor of them, or to any the Executors, Administrators or Assigns of them, or either of them; but should go to whom the said *William* the Grandfather by Writing or Will should appoint, and for want thereof to his Executors or Administrators. And it is further declared, That the said *Susan* and *Martha* shall not have any benefit, in case that they, or any other for them, should take any advantage or benefit by means of the said Indenture Tripartite, or any
Proviso

Proviso therein contained. And then, the 9th of *March*, 1651, *William* the Grandfather makes his Will, therein reciting. that he had by several Deeds, all dated *Feb. 21. Car. 1.* granted to *Knight, Cade, Webber and Ford*, certain Lands in the County of *Dorset*, for terms of years, determinable upon the death of certain persons therein mentioned, upon trust and for the use and benefit of such person or persons to whom he should by his last Will give, limit, or appoint the same: And by his Will, gave, limited and appointed all the said Estates and Terms so by him granted to the said *Knight, Cade, Webber and Ford*, to the Defendants *Gold and Doble*, in Trust, that the said *Gold and Doble*, or the survivor of them, or the Executors or Administrators of the survivor of them, should dispose of all the Rents and Profits of the said Lands, or should otherwise sell, assign and convey the said Estates and Terms, as to them should seem most convenient, towards the raising of 1500*l.* apiece to the said *Susan and Martha*: And did thereby give and appoint to each of the said *Susan and Martha* 900 *l.* to be paid unto them severally out of his personal Estate, whereof he should die possessed, accounting therein all such Moneys which he had or should lend upon the Specialties taken in the Names of *Gold and Doble*, towards the

further raisings of their said Portions unto 1500*l.* apiece, having (as by his Will is expressed, by his Deed dated the last day of *December* then last past) mad provision for advancing their said Portions to the Value out of his Lands in *Com' Somerset*; which said Portions his last Will and meaning was, should be paid unto them the said *Susan* and *Martha* severally, at their respective Ages of 21 years, or sooner, if they should be respectively Married with the Consent of the said *Gold* and *Doble*, or the Survivor of them; with a *Proviso*, That if *William Every* his Grandson, should happen to die without Issue Male of his Body lawfully begotten, before the said respective Portions should become payable to the said *Susan* and *Martha*, according to the time before limited, whereby the said *Susan* and *Martha* should be Intituled to 1500*l.* apiece, by virtue of the said Indenture Tripartite, made upon his deceased Son's Marriage; then the said Legacies or appointments of Portions unto *Susan* and *Martha* thereby made should be void, and of his Will made *Gold* and *Doble* Executors. And the Plaintiff, as Administratrix of her said two Daughters, *Susan* and *Martha*, exhibited her Bill against *Gold* and *Doble*, Executors of *William* the Grandfather, and *Webber* the surviving Trustee in the Deed of the Lands

in

in *Somerset*, and against *John Every*, the Heir in Tail of *William* the Grandfather, and seeks to be Relieved upon the Deeds and Will before-mentioned, for the 1500 *l.* apiece, given to *Susan* and *Martha* her Daughters.

The Defendants say, That *William* the Grandfather died in the life time of *William* the Grandson, and that the personal Estate of *William* the Grandfather came to 4000 *l.* and that *William Every* the Grandson was Buried 23 Nov. 1660, and was about 20 years old when he was Buried; and *Susan*, the Plaintiffs Daughter, was Buried 25 July 1655, and was about 18 years old when she was Buried; and *Martha* the Plaintiffs Daughter was Buried 4 July 1660, and was about 20 years old when she was Buried; and it appears there was sufficient Personal Estate to satisfy the several Portions demanded.

Which Case the Master of the *Rolls* having considered, and upon the Hearing before him, Declared, That he was satisfied the 1500 *l.* apiece, by the Deed and Will aforesaid, for Portions to *Susan* and *Martha*, Daughters of the Plaintiff, was a Debt or Duty well fixed in them by the said Deeds and Will, and by their Deaths did accrue and belong to the Plaintiff their Mother, as Administratrix to them, did Decree the same should be paid accordingly.

A Prior
Deed of
Settlement
barred by a
subsequent
Deed, and
New provi-
sions made
for Porti-
ons.

Which Opinion and Decree the Defendants appealed to the Lord Keeper, who being assisted with Judges, and upon reading the Deeds and Will aforesaid, were all clear of Opinion, That the Indenture Tripartite, of 27 June 7 Car. 1. is not, as the Case now stands, material or conducing to the state of the Case, or to the limitation of the Time for payment of the Portions; for that the same is by Deed of Bargain and Sale, and Release thereupon in 1651. barred, and a New provision made for raising the said Portions in such manner as he should limit by any act in his life time, or by his last Will. By which Deed the Survivorship between the two Daughters is barred, and a provision made, *That if either of them die in the life time of William the Grandson, the Portion of her so dying shall not go to her Executors, but to the Grandson.* And William the Grandfather, having by his Will of the 9th of March, 1651. wherein he recites the Deed of Decemb. 1651. limited and appointed 900 l. apiece to be paid to his Daughters severally out of his personal Estate, towards the raising their Portions to 1500 l. apiece, having (as is recited) made provision by his Deed dated the last of December, 1651, for advancing their Portions to that Value. And he doth by his Will declare and appoint, that such Portions should

should be paid unto them the said *Susan* and *Martha* severally, at the respective Ages of 21 years, or sooner if they should be married; and both of them dying unmarried before they or either of them attained the Age of 21, in the life time of *William* the Grandson: And the said Deed of *Decemb. 1651.* relating to the Will, and both of them making one entire provision, or limitation, how Portions should be raised, how the same shall be raised, and what time paid.

His Lordship and the Judges were all clear of Opinion, there was no ground for the former Decree made by the Master of the *Rolls*, or pretence of Claim to either of the said Portions of 1500 *l.* by the Plaintiff, as Administratrix to *Susan* and *Martha*, and discharged the Decreed and dismiss the Bill.

Beauchamp contra *Silverlock*, 20 *Car. 2.*
fo. 765.

THat *William Beauchamp*, the Plaintiffs Father, being a Freeman and Citizen of *London*, by his last Will gives a Third part of his Lands and Tenements whatsoever and wheresoever, to the Plaintiff, and appointed *Dorothy* his wife Guardian to his Children, and made her sole Executrix, and *Richard Camden*, *Robert Cheslyn*,
Orphans Mony.
John

John Pace and *Hogan Howell*, Overseers ; and the said *Dorothy* makes her Will afterwards, and gave the greatest part of her Estate to the Plaintiff, and Willed her Brother *Hogan Howell*, and her Sister *Margaret Cheslyn*, and the Survivor of them to be Guardian to her Children, and made the said *Hogan Howell* and *Margaret Lovell* her Executors, and died. That by Articles of Agreement between *Hogan Howell*, *Robert Cheslyn* and *Margaret* his wife, reciting the Will of *Dorothy Beauchamp*, whereby they agreed to administer the Estate to the best benefit of the Children, and exhibit a true Inventory into the *Prerogative Court*, and that they should with the consent, and not without the consent and knowledge of each other, use their best endeavours to get in the Estate, and not to release any part of it without each others consent, and that if *Hogan Howell* should die and *Margaret* survive, then the Executors or Administrators of *Hogan Howell* to make a true account to *Margaret* of all the Estate which he should receive of the said Testators, and pay the same to *Margaret*, or to such person who shall by the consent of the said *William Beauchamp* the Plaintiff, be chosen as Guardian to receive the same, or to such person to whom by Right or Law the same ought to be paid, and the same Agreement
and

and Covenant is, if the said *Margaret* should die and *Hovell* survive.

That *Robert Cheslyn* died, and the said *Margaret* married the Defendant *James Silverlock*.

And *Hogan Hovell* possess himself of the greatest part of the personal Estate of the Plaintiffs said Father and Mother, and received the profits of the Lands of the said *Margaret*, receiving only Title as Executor.

That *Hogan Hovell* made his Will and *Mary* his wife Executrix; and afterwards the Guardianship of the Plaintiff, the Orphan, is at his Friend's Decree committed to Sir *William Bateman*.

That the said *Mary Hovell*, the Executrix of *Hogan*, exhibited an Account into the Orphans Court of the Mony received by her Husband, belonging to the Plaintiff, out of which Allowances being made, there rested due to the Plaintiff 933 *l.* and that afterwards the Defendant *Silverlock* and *Margaret* his Wife, the Surviving Executrix of *Dorothy*, did by their Deed empower Sir *William Bateman*, then reputed a Man of great Estate, to receive of *Mary Hovell*, Executrix of *Hogan Hovell*, who was the other Executor of the said *Dorothy*, the said 933 *l.* to the use of the Plaintiff, and to give a discharge for the same; that Sir *William Bateman* received it accordingly,

cordingly, and gave a Discharge for it in the Name of *Silverlock* and his Wife, and gave Security after that to the Court of Aldermen, to pay the Plaintiff 800 *l*.

That *Mary Hovell* died, and made Executors.

Executors
paying in
Orphans
Mony by
consent of
Friends and
Trustees,
into the
hands of
Sir *W. B.*
Guardian,
who gave
Security to
the Court
of Alder-
men, not to
be charged
upon the
Insolvency
of Sir *W. B.*

That the Plaintiff did several times after he came of Age, own Sir *William Bateman* to be his Debtor for the 933 *l*. that the Plaintiff received of Sir *William Bateman* 440 *l*. and gave Acquittances for it; the first was on the 4th of *January*, 1663, the last on the 25th of *July* 1666; that the Plaintiff came of Age in *Decemb.* 1663, and the said Sir *William Bateman* became Insolvent at *Christmasts*, 1666.

The Question touching the said 933 *l*. claimed by the Plaintiff, and whether the same should be charged on the Defendant *Silverlock*, and surviving Executor of *Dorothy Beauchamp*, or on the Defendant Sir *William Bateman*, who had given Security to the Chamber of *London*, as aforesaid, for the Plaintiffs use.

This Court as to the Executors of *Mary Hovell*, declared, there was no reason to charge him therewith; but that they ought to be discharged and dismiss from being accountable for the same. And as to the Defendant *Silverlock*, the Case being as aforesaid, declared that there was a clear Intention of all parties to perform the parties

~~parties~~ afore said, and that the said Defendant *Margaret* never received any Estate during *Hogan Hovell's* Life, and that Sir *William Bateman* being chosen by the consent of the Friends of the Plaintiffs, and by the Order of the Court of Orphans appointed Guardian to the Plaintiff, she the said *Margaret* gave in an Account to the Court, and empower'd Sir *William Bateman* to receive the Mony, who before had given Security to answer the same, or the greatest part thereof; and when the Plaintiff came of Age, he admitted and owned Sir *William Bateman* to be his Guardian, and received several Sums of Mony from him, and Sir *William* proved not Insolvent till three years after; and so there being no default in the said Defendant *Margaret*, there was no reason to charge her the said *Margaret* with the same, but that she ought to be dismiss and discharged from the same. But Sir *William* having given Security to the Court of Orphans for 843 *l.* part of the said 933 *l.* by him received, by Order of the Defendant *Margaret*, and that for the residue (being 90 *l.* 10 *s.*) there was no Security given by the said Sir *William*. This Court Declared, That the Defendant *Margaret* ought to be charged with the same, and Decreed accordingly, but not with Interest for it.

Windham

*Windham contr. Love, 20 Car.2. fo.100.
21 Car. fo.741.*

Executory
Devise.

THe Bill is, That the Dean and Chapter of *Winchester*, June 17 Jac. granted the premisses to *Gilbert Searle*, his Heirs or Assigns, during the Lives of the two Defendants, *Barnaby, Robert* and *Nicholas Love*, Sons of *Dr. Nicholas Love*, and to the survivor of them in Trust for the said *Dr. Love*: And the said *Gilbert Searle*, in July 17 Jac. demised the said premisses to the said *Dr. Nicholas Love* for 99 years, if the said *Nicholas*, and the Defendants *Barnaby* and *Robert Love* the Sons, or any of them should so long live; and the said *Dr. Love* had the Original Lease made by the Dean and Chapter, delivered to him by the said *Searle*; and afterwards the premisses by mean Conveyances came to *Nich. Love* the Son, who claimed the same absolutely to himself during the said Term, and was the reputed Owner thereof. And in the late Usurping Times, the said *Nicholas* the Son had the premisses confirmed to him, and the said Defendants never pretended any Right, possibility, or Executory Estate in the said premisses after the death of the said *Nicholas* the Son. And the said *Nicholas* the Son, by Act of Parliament declared, forfeited his Estate to His Majesty upon

upon account of Treason, and His Majesty granted the premisses to the Duke of York and his Heirs, and he 18 Car. 2. granted the premisses, and all the Writings, to the Plaintiffs, their Executors, Administrators and Assigns, during the residue of the term.

The Defendants insist, That the said Dr. Love, the Plaintiffs Father, by his Will, 15 Car. 1. did Devise the premisses to *Dulcibella* his Wife for Life, for so many years of the said 99 years as should not be spent in her Life; and after her death, then to the said *Nicholas Love*, the Son, for so many years of the said term as he should live; and after the death of him and the said *Dulcibella* unto the Defendant *Barnabas*, his Executors, Administrators and Assigns for all the residue of the said term, and made the said *Dulcibella* his Executrix, who assented the said Will and Executory devise, and she enjoyed the premisses during her life; and after her death, which was about 1656, the said *Nicholas Love* the Son entered, and by virtue of the Will possessed the premisses for the residue of the said term as was not spent, and not by virtue of any Assignment, nor otherwise than the said Executory devise; and if the said *Nicholas* did purchase the premisses of the Usurpers, the same ought not to prejudice the Defendant *Barnaby's* Right and Interest

Interest in the premisses by the said Executory devise, which he claimeth after the death of *Nicholas* the Son, by virtue of the said Will of his Father, as aforesaid, and say, That *Nicholas* the Son had no other Estate therein, but in expectancy of the death of *Dulcibella*.

This Court referred it to be tryed at Law upon this Issue (*viz.*) Whether the Defendant *Barnaby*, by the Will of the said *Dr. Love*, hath or shall have any Estate or Interest, or possibility in the premisses, after the death of the said *Nicholas Love*, the Son, if the term so long continue.

Term is devised to N. and if he die without Issue, then to B. this is a void Devise to B. it is too remote a possibility.

The said Issue was tryed, where a Special Verdict was found, That *Gilbert Searle* being possessor of the premisses for the Lives of *Nicholas*, *Robert*, and the Defendant *Barnaby*, demised the premisses to *Dr. Nicholas Love* for 99 years, if either of the Three live so long; and that the said *Dr.* afterwards made his Will, and devised the premisses to *Dulcibella* his Wife, for her life, and after to *Nicholas* his Son for his Life, and if he died without Issue, then to the Defendant *Barnaby*, and made the said *Dulcibella* Executrix, who assented to the said Devise: That in *Easter Term* last the Special Verdict was Argued in the *Kings-Bench*, and upon great Debates Judgment was given for the Plaintiff.

This

This Court Declared, That the Defendant hath no Right or Title to the premises ; and Decreed the Plaintiffs, their Heirs and Assigns , to enjoy against the Defendant.

Vide this Case well debated at Common Law , in *Siderfin's* Reports, p. 450. *Windham* and *Love*.

Moseley cont. *Maynard*, 20 *Car.2*.fo.999.

§ 22 *Car.2*.fo.274.

THis Suit is, to have the Will of Sir *Bill* to have *Edward Moseley* Decreed, which up-a Will de- on a Trial hath been found a good Will. creed.

This Court, with the assistance of Judges declared , They saw no Cause to decree the said Will.

This Cause also is touching Alteration of Possession.

The Point touching the Decreeing of the said Will Heard and Argued again.

The Plaintiff insisted, That it is the proper Justice of this Court , to settle Estates in peace and quietness, and pressed to have the Will decreed ; especially, for that no Purchaser would meddle under the Title of the Will , and that the Plaintiff was by the Will to raise 10000*l.* to be paid according to the directions of the said Will by a time therein prefixed, or else he forfeited his Estate therein.

C

But

But the Defendants insisted, It is altogether improper to decree a Will in this Court, especially to the disinheriting of a Feme Covert, and her Son an Infant, and that this Court had refused to decree the same in a former Order with Judges. This Court Ordered a New Bill to be brought.

The Point touching the Condition in the Will, settled on a Bill of Review, the Proofs in the Original Cause not allowed to be read.

Proofs in an Original Cause, not allowed to be read on a Bill of Review.

Macklow contra Wilmot, 20 Car. 2. fo. 548.

Defendant not to be Examined upon Interrogatories.

THE Plaintiff would have the Defendant examined on Interrogatories, to discover Deeds and Writings, and to be examined to other Matters.

The Defendant insists, That what the Plaintiff now moves for may be of dangerous consequence, being to discover the Estates of Purchasers, to whom the said Defendants have sold most of the Lands in question, and it is now long since the Cause was heard, and many Attendances on the Master, and Examinations before him, and the Decree is Inrolled by the Plaintiff; wherefore the Defendant ought not to be examined on Interrogatories, being to put up the Order on Hearing,

in

in a Point, that the Plaintiff at the Hearing did not think fit to move for.

This Court, in regard the Examining of the Defendant on Interrogatories, is omitted out of the Decree, this Court would not now Order it.

*Dominus Read contra Read, 20 Car. 2.
fo. 146. L.B.*

THis Case is touching the granting a *Ne exeat Ne Exeat Regnum* against the Defendant.

The Defendant insisted, that the said Writ ought not to be issued out, for that the Affidavit of the Lady *Read* did not contain ground sufficient to warrant it. For that the Writ is a Writ of *Prerogative* on behalf of the Crown; and the reason of granting it is, that the party against whom it is prayed intends to convey away some considerable Treasure out of the Kingdom, or do some other matter prejudicial to the King or his Government, which the Affidavit doth not specify; and if that were, yet no Writ doth regularly lie in this Case against a Lay-man to find Security, as this Writ is, but only against a Clergy-man; neither is the Writ Indorsed, as formally it ought to be, and therefore ought to be superseded, and several Cases were offered, and Presidents

Superseas.

C 2

pro-

produced on the behalf of the Defendants.

The Causes
of a *Ne
exeat Reg-
num.*

3 Inst. 179.

Lay-men to
find Security,
as well as
Clergy-men,
upon a *Ne
exeat Reg-
num.*

But the Plaintiff insisted, that by the Affidavit of Sir *John Read*, the Defendant, conveying and making over his Estate to others, standing out an Excommunication and absconding his person, and giving out That he intends to go beyond the Seas, the said Writ is well warranted; and for Justification thereof several Cases and Presidents were urged; and it appearing that the only matter which carries any countenance or pretence of irregular issuing the Writ, that it ought to be for a Clergy-man to find Security, and not for a Lay-man, is an Opinion taken up in a Posthumous Work of the Lord *Coke*, being called his *3d Institutes*, contrary to the general Authorities, Presidents and Practice of granting Writs of *Ne exeat Regnum* in former and later Times, which are usual against a Lay-man to find Security, as well as a Clergy-man, or else there can be no Writ at all to be found in the Register against a Lay-man to find Security in any case, or any *Ne exeat Regnum* against a Lay man; neither is there in the Register any such form of Indorsing the Writ, as is suggested, but what is inserted in the Register is but a Note of some Observer. So that his Lordship, with the Judges, are of Opinion upon the whole Matter,

Matter, that there is no ground to grant a *Superfedeas* of the said Writ of *Ne exeat Regnum*, but that the same was well granted, and ought to stand, and Ordered it accordingly.

Dixon contra Read, 20 Car. 2. fo. 46.

6561.

THe Bill is, That the Plaintiff being No relief
Sued by the Defendant *Read* in the against a
Sheriffs Court in *London*, upon a Bond of Bond entred
200 *l.* for the payment of 100 *l.* to the into to a
said Defendant by the Plaintiff, when the Solicitor, to
said Defendant being a Solicitor should pay 100 *l.*
recover a Verdict on the behalf of one when a Ver-
Thrale; upon which Bond, though the dict should
Defendant was so far from being instru- ed.
mental in getting any such Verdict, that
he acted for *Thrale's* Adversary; yet the
Defendant hath gotten a Verdict on the
said Bond: Whereupon the Plaintiff remo-
ved the Cause into the Mayor's Court,
and from thence into this Court by *Cer-*
tiorari, and the Plaintiff (according to
proceedings in such cases) proved his Sug-
gestions: Yet the Defendant, without a
Procedendo, hath removed the Proceedings *Procedendo*
back, out of the Mayor's Court into the
Sheriffs Court, and hath there taken out
Execution, and taken the Plaintiffs Bail
thereupon and levied 102 *l.*

This Cause was heard by the Master of the *Rolls*, who saw no cause in Equity to Relieve the Plaintiff against the Penalty and Interest of the said Bond.

This Cause came to a Re hearing before the Lord Chancellor, being assisted with the Lord Chief Justice *Hales*, who were of Opinion with the Master of the *Rolls*, and confirmed his Decree.

Smith contra Holman, 20 Car.2. fo.192.

THAT the Defendant caused the Plaintiffs Bail at Law to be Arrested soon after the Plaintiff and Defendant had joyned in a Commission for Examining of Witnesses, which was for the same Matter here in question; and also about two days before the Execution of the Commission, the said Defendant caused the Plaintiff to be Arrested when he was preparing for the said Commission, so that the Plaintiff could not execute the same.

The Plaintiff prays, That the Defendant, for such his Abuse, being against the ancient Priviledge of this Court to Suitors, that are in the management of their Causes in this Court, may stand Committed, and pay the Cost of the last Commission, and damages sustained by the said Arrest.

Plaintiff
two days
before the
Commission,
for Exami-
nation of
Witnesses,
was arrested by the Defendant, and in Execution; ordered to be discharged, and the Defendant to pay Costs, and be at the charge of a New Commission.

The

The Defendant insisted, he was ignorant of such Priviledge, and that the Plaintiff was now in Execution.

This Court, in favour of the Defendant, spared the Commitment, but ordered him to pay the Plaintiff Costs of the last Commission; as also his costs and damages sustained by reason of the Arrest, Imprisonment and Prosecution thereon, and referred it to a Master of this Court to Tax, and that the Plaintiff giving a new Judgment for the debt in question, the Defendant shall at his the Defendants Charges, presently release and discharge the said Plaintiff out of Execution, and the Defendant to be at the charges of a New Commission, and the Plaintiff to take an Injunction till Hearing of this Cause.

*Wiseman contra Foster, 20 Car. 2.
to. 731.*

THe Plaintiffs Father, *George Briggess*, by Will devised to the Plaintiff *Ann*, 500 *l.* for her Portion, which was appointed to be paid to her at the Age of One and twenty years, or day of Marriage, and made the Defendant, Dame *Ann Foster*, his then Wife, and his Son *George*, his Executors; and by a subsequent Clause in his Will, declared, That it should

be in the power of his Executors, to order and dispose of the Plaintiffs Portion, according to their discretion, to the use of the rest of the Children, unless the Plaintiff should marry by the advice and consent of the Defendant, Dame *Ann*, and others, who were Overseers of his Will, or the greater part of them: And the Defendants insist, That the Plaintiff hath Married without such consent, therefore ought to have but 250 *l*. Whereas the Plaintiff insists, That the said Clause was intended only *in terrorem* and awe to the Plaintiff *Ann*, to induce her to take heed how she married, and not that she should lose any part of her Portion, so as she married one who deserved the same, which she hath done with the consent of the Major part of the Overseers.

Portion to
be paid on
Marriage,
with consent
of, &c.
Some con-
sent, and
some not;
yet decreed
to be paid.

The Defendants insist, That the Plaintiff marrying, as aforesaid, ought to have but 250 *l*. as by the *Memorandum* in the Will, and the rest to be distributed amongst the other Children of the Testator.

But the Plaintiff insists, That in this case there was not by the Will any devise over to the said other Children.

This Court, upon Reading the Proofs touching the approbation of the Major part of the Overseers, and their consent to the Plaintiffs marriage, decreed the Defendants

dants to pay the Five hundred Pounds and Damages.

Rowley contra Lancaster, 21 Car. 2.
fo. 993.

THat Matthew Lancaster bequeathed Will.
to John Creeke 100 l. thus, (*viz.*)
50 l. in one Month after the Expiration of Devise of
his Apprenticeship, and the other 50 l. Mony to be
within one whole year after the Expiration of the said Apprenticeship, and made Day to
the Defendant Executor: That the App- come.
renticeship expired 29 Sept. 1664. but Devisee dies
John Creeke dying before the Legacy was Day; yet
paid, the Defendant refuses to pay it to payable to
the Plaintiff, the Administrator of the said his Admini-
John Creeke. strator.

The Defendant insists, That he paid the
50 l. due within a Month after the Expi-
ration of the Apprenticeship, and that
the said John Creeke died before the whole
year after the Expiration of his Appren-
ticeship was expired, and therefore the
other 50 l. was not due to the Plaintiff.

This Court being assisted with Judges,
were clear of Opinion, That the said Le-
gacy was *Debitum in præsenti solvend' in
futuro*, and decreed the said 50 l. to be paid
to the Plaintiff with damages.

Fry

Fry contra Porter, 21 Car. 1.
fo. 568.

Will.

THat the Earl of *Newport*, deceased, by his Will devised to the Plaintiff the Lady *Ann*, the Messuage called *Newport House*, with the Appurtenances, thus; (*viz*) I do give and bequeath unto the Lady *Ann*, Countess of *Newport*, my Dear Wife, all that my House called *Newport House*, and all other my Tenements and Hereditaments whatsoever in *Middlesex*, for her Life; and after her decease, I do give and bequeath the said House, and all other my Tenements and Hereditaments, as aforesaid, to my Grandchild the Lady *Ann Knowles*, the Daughter of *Nicholas* Earl of *Banbury*, by the Lady *Isabella* my late Daughter, and to the Heirs of her Body lawfully to be begotten. Provided always, and upon Condition, that my said Grandchild, the Lady *Ann Knowles*, do marry with the consent of my said Wife, and of *Charles* Earl of *Warwick*, and *Edward* Earl of *Manchester*, or the Major part of them. And in case the said Lady *Ann Knowles* do and shall marry without the consent of my said Wife, and the Major part of my Trustees aforesaid, or shall happen to depart this Life without any Issue of her Body; then I will and bequeath

bequeath all the said premisses unto my Grandson *George Porter*, Son of my deceased Daughter, the Lady *Ann*, late Wife of *Thomas Porter* Esq; and to his Heirs for ever.

The Bill is to be Relieved against the Forfeiture of the said Estate, for not performing the said Condition in the Will, and Marrying against the consent of the Trustees and the Mother: Yet the said Mother was told, That the Plaintiff was about to marry, and said nothing to the contrary; whereupon the Plaintiff married and hath Issue.

The Plaintiff insisting, That if any Error were committed in Marrying, it was through Ignorance, and not Obstinacy, she the Plaintiff being very young, and knew not of the *Proviso* or Condition in the said Will; and it would be very unreasonable to make the happiness of the Plaintiff to depend upon the consent of Strangers in point of Marriage, to put it into their power to keep her during her life, either from Marrying, or from her Estate, and thereby make them Masters of her Affection or Fortune, and to disinherit her and her Children.

But the Defendant insists, That the Reason of inserting the said *Proviso* into the said Will was, that the Plaintiff the Lady *Ann* might be disposed of in Marriage

Lands devised on Condition, the Devisee marry with consent, and limitation over. Devisee marries without Consent ; she shall not be relieved, but the Land decreed to the remainder Man.

riage without disparagement, and therefore that she should marry with the consent of the said Countess and the two Earls, or the Major part of them; and of that other Clause, (*viz.*) That if she married without such Consent, then he gave the said House and Premises to the said Defendant *George Porter* the Infant, and his Heirs for ever; and that the said Lady *Ann* having Married a person very unequal to her Fortune, and without such Consent, as aforesaid, having little or no Estate, had made a wilful breach of the said *Proviso* or Condition in the said Grandfathers Will; and the said *George Porter* claims the said House to him and his Heirs, by virtue of the said Condition and Limitation over to him by the said Will, the construction whereof is to be made out of the Will it self, and not otherwise; and the said Lady *Ann* had notice of the said Will before marriage, there being discourse of it by the Trustees to her, and so the Lady *Ann* ought not to be relieved against the said Forfeiture or Limitation aforesaid.

This Court, with the Judges and on perusal of Presidents, are clear of Opinion and fully satisfied, That the Plaintiff ought not to be relieved against the said Forfeiture, and that the same was such

as ought not to be relieved in Equity, and dismiss the Plaintiffs Bill.

Vide this Case in *Mod. Rep.* p. 300. with Counsels and Judges Arguments, *seriatim*.

Shalmer contra Tresham, 21 Car. 2.
fo. 560.

THe Bill is, to discover the Deeds of several Lands, and whether they were not made in Trust, and whether the Debt demanded by the Plaintiff, were not mentioned in a Schedule thereunto annex'd.

The Defendant pleaded, That he was a Bill to discover Settlements in Trust.
Scrivener by Profession, and hath taken the accustomed Oath that Scriveners do before they are made Free in *London*, whereby he is obliged not to discover the Secrets of those persons business that employ him in that Trade, without their leave; and that he was employed by and assisted Sir *John Langham* in the purchasing of the said Lands, and the Writings concerning the premisses he drew, and hath the Keeping thereof by the said Sir *Johns* Direction, and so ought not to discover the said Writings, contrary to his Trust, nor any thing relating to this Matter.
Plea, That the Defendant is a Scrivener, and had taken Oath, not to discover the Secrets of his Clients.
Overruled.

This

This Court declared, That the Oath of a Scrivener doth not oblige from a discovery, more than the Oath of any other Free man of *London*: And if it had been in the case of a Counsellor at Law, the said Plea had been Insufficient in this case; and Overruled the Plea, saving he is not to Answer to whom he paid the Purchase Mony.

Alford cont. *Pitt*, 21 *Car.2.* fo.181.

Demurrer.
Remedy at
Law.
Award.

THE Plaintiffs Suit is, to have the benefit of an Award. To which the Defendant demurred, and says, That the Plaintiff ought to take his Remedy at Law.

This Court Overruled the Demurrer.

Langton & al, contra *Tracy & Astrey*,
21 *Car.2.* fo.376.

THE Bill is, to have the several Debts due to the Plaintiffs, being Creditors of the Defendant *Roberts*, paid.

The Case is, (*viz.*)

Payment of
Debts.

That *Thomas Roberts* conveyed the Mannor and Lands in question to the Defendant *Tracy* for payment thereof, and of his other debts; but before that Conveyance to *Tracy*, the Defendant *Nicholas* standing ingaged as Surety for the said *Roberts*

Roberts for several of the debts, the said *Roberts* made the said *Nicholas* a Lease of the premisses for Sixty years at a Pepper-Corn Rent; and such Lease being made, and no care taken for satisfying the debts, the Plaintiffs Sue the said *Roberts* for their debts, so to avoid such Prosecution, made the aforesaid Conveyance to *Tracy* in Fee, upon Special Trust to pay all his debts; but *Tracy* combining with the Defendant *Astrey*, who had procured the said *Nicholas* to assign his said Lease to him, after Notice of the Trust, contrived a conveyance of the premisses from *Tracy* to him the said *Astrey* by way of Bargain and Sale Inrolled, so that *Astrey* pretends himself a Purchaser of the premisses from the said *Thomas Roberts*, and not under the said Deed of Trust, or Lease and Assignment, and pretends the Trust is destroyed, the said Conveyance being not Inrolled, whereas the said Deed was well executed, and the Trust accepted, by which the said Deed cannot in Equity be made void until payment of the said debts.

The Defendant *Astrey* insists, That the Deed in Deed to *Tracy* for the payment of debts Trust to was a void Deed, as against a Purchaser, pay debts, there being no Creditor party or privy tho' the Creditors are not Parties, and no Certainty of Debts therein appearing; yet good against an after-Purchaser, who had Notice of this Trust.

thereto,

Voluntary
Convey-
ance.

thereto, nor any Schedule of Debts thereunto annexed, and that the said Conveyance was voluntary, and made only between *Roberts* and his Wife, and *Tracy*, and the Creditors not parties thereto; and that by the said Conveyance, *Roberts* was to have all such Mony out of the premisses, from time to time, as he thought fit for the livelyhood and subsistence of himself, his Wife and Family. and that the said Conveyance to *Tracy* being voluntary, and in its nature but in Trust for *Roberts*, and Revokable by him after the Conveyance to *Astrey*; and *Roberts* having exhibited a Bill against *Tracy*, to set aside the said Conveyance, *Tracy* surrendered the same to *Roberts*, who Revoked it, and both Cancell'd it; and afterwards *Roberts* and his Wife conveyed the premisses to *Astrey*, and levied a Fine thereon.

But the Plaintiff insists, That after the Conveyance to *Tracy* was made, he declared he would pay the Plaintiffs debts, which is proved by the Plaintiff Sir *John Knight*.

One of the
Plaintiffs a
Witness.
Deposition.

The Defendant insists, That Sir *John Knight* is interess'd and intituled to some of the debts in question, and continued a Plaintiff throughout the Cause, and is not struck out of the Bill, and is but a single Witness, and his Evidence denied by the Defendants Answer, and therefore his deposition ought not to be read.

This

This Court declared, They would see Presidents where a Conveyance made voluntarily for payment of debts, and no Creditors named or appearing in any fix'd certainty of the persons, and with a *Proviso* for the Grantor to have Maintenance out of the premisses, conveyed for himself and Family, without limitation of how much; whether such Conveyance be Revokable by the Grantor and Grantee.

This Court, with the assistance of the Judges, were clear of Opinion, That the Deed from *Thomas Roberts* to *Tracy*, and the Trust thereby created, were made and created with an honest Intention to pay the debts of the said *Thomas Roberts*, and that the same was not fraudulent, though no certainty of the debts appear therein; but the same being made on a Trust, which was a good foundation, and a just and honest Consideration, and none of the Creditors complaining of any fraud, the same ought to be taken as a good Deed, and the Defendant *Astrey* coming in under this Deed, and having Notice of this Trust, and paying the debts under it, ought to receive no countenance in this Court, but the Estate ought to be charged with the same, in whose hands soever the same shall come, and decreed the Deed of Purchase from the said *Roberts* to *Astrey* be set aside, and *Astrey* to account for the Profits, &c.

D

and

and the Plaintiffs, and all the Creditors, to be paid their debts out of the said Estate.

*Eyre contra Good & al', 21 Car. 2.
fo. 211.*

Award.

THe Bill is to be relieved against a Bond of a 1000 l. penalty for the performance of an Award, whereby possession and profits of Lands are awarded to the Defendant.

The Defendant insists, That there was no surprize in the said Award, but the said Award was by the direction of the Plaintiffs Friends, and says, it ought not to be set aside, which if it was, it would involve many Suits; and insisted, That the said Award is in the nature of an Agreement, and ought to be performed.

Cross Bills
about the
setting aside
or confirm-
ing an A-
ward dis-
miss, and
sent to Law.

This Court taking Notice, that the Award in question was not made by the Order of this Court, but that it proceeded from the voluntary Submission of the parties; two Judges being chosen by themselves, who declared their Opinion, That they saw no cause to decree the Award to be set aside; nor on the other side to confirm it, or to relieve the Plaintiff; but ordered both Bills to be dismissed, the Plaintiff electing to go to Law: This was heard by Justice *Tirrel*.

This

This Cause came to be Re-heard before the Lord Keeper, being assisted with Judge *Wild*, who confirmed the Order above.

Hale contra Atton, 21 Car. 2. fo. 409.

That *Edward Eltonhead* by his Will gave the Defendant *Mrs. Gilbourne* 1000 *l.* to be first paid after his debts, besides a Share out of the dividend of the Estate, when as after the making the said Will, the said *Edward Eltonhead* and *Henry Gilbourne*, Father-in-Law to the Defendant *Mary Gilbourne*, before her Marriage came to an Agreement, for what the said *Mary* should have out of the said Estate, and that there should be but 1100 *l.* and the same was to be in full of what was intended her thereout, and that the said *Edward Eltonhead* often so declared, and in his life-time paid 500 *l.* and after his death his Executor paid 100 *l.* more in pursuance of the said Agreement, so as the chief Point then controverted being, whether the said Defendant *Mrs. Gilbourne* ought to have the 1100 *l.* Portion, and 1000 *l.* Legacy, mentioned in her Fathers Will, or that he intended to give her any more out of his Estate than the said 1100 *l.*

Devise by Will, and an Agreement about a Portion, not intended several Sums.

D 2

The

The Master of the *Rolls* declared, That the 1100 *l.* ought to be in full of what the Defendant *Gilbourne* was, and ought to have out of the said Estate, and decreed accordingly.

This Cause came to be Re-heard before the Lord Keeper *Bridgman*, who declared, He saw no cause to alter the said former Decree, and so confirmed it.

Brabant contra Perne, 21 *Car.2.* fo. 146,
 & 344.

Depositions of Witnesses under the Hand of a Six-Clerk, then in a Cause between *Butt* and *Perne*, about Thirty years since, the Plaintiff in this Cause prayed the same might be recorded; the Record of the Original Depositions in that Cause being lost.

Copies of
 Depositions,
 not to be
 recorded or
 exemplified.

But the Defendant *Pernes's* Counsel insisted, it would be of dangerous consequence and president, to suffer Copies of Depositions to be Recorded, and used as Evidence in case of Title of Land, there being no Cause in Court or parties to the said former Suit, there being since the dissolution of the said former Suit two Trials brought by the said *Butt* concerning the said things in question, upon both which two Nonsuits passed against the said *Butts* Title, the Witnesses which were examined
 in

in this Court being all then living, and two Verdicts upon full Evidence on both sides ; and one other Verdict since 1664. hath been found for the Defendant's Title against the now Plaintiffs Title, and some of the Witnesses at the said Trial have sworn otherwise than is expressed in those Copies of the Depositions, which the Plaintiff would have now recorded and exemplified.

This Court would not allow the said Copies of the Depositions to be recorded or exemplified, but they being before Ordered so to be by the Master of the *Rolls*, it is Ordered they shall be vacated and made void and cancelled, and taken off the File.

Alexander contra Alexander, 21 Car.2:
fo.324.

THe Suit is, to discover the Estate of Assets.
Richard Alexander deceased, which is come to the Defendants hands, to satisfy a debt of 300 *l.* due to the Plaintiff from the said *Richard Alexander*.

The Defendant insisted that the Plaintiff ought not to have Relief in this Court, in regard the Assets in the Defendants hands were legal Assets, and nothing appeared, but that the Plaintiff had her proper remedy at Law, having not proved

any thing more to be in the Defendants hands than was confessed in the Defendant's Answer.

Bill to discover Assets.

But the Plaintiff insisted, That this Court hath directed Accounts in cases of this nature to avoid circuitry of Action, and further charge and trouble of Suits; and that this Court being possess of the Cause, and the parties at Issue on Proofs, the same was as proper for this Court, as at Common Law.

This Court ordered Presidents to be searched, where this Court hath directed Accounts and given Relief in this Case, and the Cause coming to be heard on the Presidents and Merits thereof; and the Plaintiffs insisted, that there is sufficient Assets of the said *Richard Alexander* come to the Defendants hands, to satisfy the Plaintiffs debt with Overplus.

This Court decreed the Defendant, to come to an Account for the Estate of one *Blackhall*, unadministred.

Tate contra Hooke, 21 Car.2. fo. 939.

That *John Hele*, on the 23^d Dec. 1654. Mortgage
for 2000 *l.* mortgaged *Longs Court* by demise
and other Lands to *Jasper Edwards*, his and re-
Executors, Administrators and Assigns for demise.
99 years, and the said *Edwards* on the
25th of Dec. 1654. re-demised the same to
the said *John Hele* for 98 years at a Pepper
Corn Rent, on Condition, That if the
said *John Hele*, his Heirs, Executors, Ad-
ministrators and Assigns, did not pay to
the said *Jasper Edwards*, his Executors,
Administrators and Assigns 2150 *l.* at a
certain day therein mentioned, that then
the said Re-demise to be void, and Cove-
nanted for him, his Heirs, Executors and
Administrators, to pay the same accord-
ingly; and in *Hillary Term* 1654. the
said *John Hele* acknowledged a Judgment
of 4000 *l.* to the said *Jasper Edwards*, for
the performance of the Covenants in the
said Demise and Re-demise; and after, in
1656. the said *John Hele* for 500 *l.* mort-
gaged the said premises to *Joseph Jackson*,
his Executors, Administrators and Assigns,
reciting the said Mortgage to *Jasper Ed-
wards*, to have and to hold the said pre-
misses to the said *Joseph Jackson*, his Exe-
cutors, Administrators and Assigns, for the
residue of the said term demised to the

said *Jasper Edwards*, and to hold the Reversion to the said *Joseph Jackson*, his Heirs and Assigns, for the use of the said *Joseph Jackson*, his Heirs and Assigns for ever, on Condition, That if the said *John Hele*, his Executors, &c. paid to the said *Jackson*, his Executors, &c. 515 *l.* in June next following, then the said Deed of Mortgage to be void, and the said *John Hele* to Re-enter, as in his former Estate; and the said *John Hele* Covenanted with the said *Jackson*, his Heirs, &c. to pay the said 515 *l.* and for further confirmation, granted to the said *Jackson* all his Equity of Redemption; and afterwards the said *Edwards* and *Hele* for 2000 *l.* paid by *Jackson* to the said *Edwards*, the said *Edwards* and *Hele* assigned the said premisses to *Jackson*, with Condition or Proviso, That if the said *Hele*, his Heirs or Executors, should pay to the said *Jackson*, his Executors, &c. 2060 *l.* then the said demise from *Hele* to *Edwards* to be void; and afterwards in 1657. *Edwards* assigned the said Judgment of 4000 *l.* to the said *Jackson*, his Executors, &c. and the said *Hele* in 1660. died, leaving the said Defendant *Sir Thomas Hooke* his Nephew and Heir.

And the said *Jackson* having made his Will, and devised to his Daughter *Sarah*, Wife of the Defendant *Alford* 2000 *l.* and to the said *Joseph Jackson* his Son 2000 *l.* with

with his Lands, Tenements, &c. and to the Heirs of his Body; and for want of Issue, then the one half of his Lands so given to his Daughter *Ann Tate*, and the other half to his Daughter *Earle*, and the Issue of their Bodies equally; and that in case his personal Estate fell short, then every Legatee to abate in proportion to make it up the one half, and the other half his Son *Joseph* should make good out of what he had bequeathed to him, and made the Defendants *Tate*, *Earle* and *Aldworth* Executors; and if his Estate should amount to more than he had bestowed, then that the said *Joseph* and *Sarah* should have the one half of it, and his Son *Tate* and his Wife, and his Son *Earle* and his Wife, and what Child he should have living at his decease, the other half: Afterwards the said *Joseph Jackson*, having in his Account accompted the said Mortgage Mony as part of his personal Estate in 1661, died, leaving the said *Joseph Jackson* his Heir; that no Entry had been made either by the Testator in his life time, or by the said *Joseph* his Son and Heir, upon the said mortgaged premisses; but the said *John Hele* and Sir *Thomas Hooke* had received all the Rents and Profits.

So as the Question was, Whether the said Mortgage Moneys are due and payable to the Heir or Executor of the said Testator *Joseph Jackson*. This

Mortgage-Mony payable to the Executor, and not to the Heir, by several good circumstances in the Conveyances.

This Court upon reading the said Deeds and Will, conceived that there was no question in the Case, but that the said several Sums of 2000 *l.* and 500 *l.* being the Mortgage-mony, ought to go not to the Heir, but to the Executors, and to be accounted part of the Testators personal Estate, he having by his Will given his real Estate by Name to his Heir, besides his Portion of 2000 *l.* and one 4th part of the Overplus of his personal Estate, the rather, for that it was not in the power of the Heir to discharge the Judgment or the Mortgage, and the Moneys by the several *Provisoes* being made payable to the Executor, and not to the Heir; and the Original Mortgage being but for years, though altered by Act in Law, and the Testator having by Will charged the Lands devised to his Heir to supply the deficiency, if the personal Estate should not be sufficient: Whereas, if he had not taken the Mortgages to be part of his personal Estate, he would have supplied the same out of the Mortgages; and decreed Sir Thomas Hooke to Redeem, and he pay the Plaintiffs, the Executors, the Mortgage-Mony with Interest.

Tolson

Tolson contra Lamplugh, 21 Car. 2.
fo. 786.

THe Plaintiff prays liberty to make Depositions use of Depositions taken in a former Cause, wherein *Henry Tolson*, the Plaintiffs late Father deceased, was Plaintiff against *Abraham Moline* and his Wife, and Mr. *Winstanley*, Defendants. taken in a former Cause made use of.

The Defendant *Lamplugh* insisted, That there is no colour or ground for the using the said Depositions taken in the Cause, wherein the said *Henry Tolson* was Plaintiff at the Trial, directed those Depositions, being taken in a Cause whereto neither of the Defendants, the *Lamplugh's*, are parties; and there is more difference of the Title between the Defendants the *Lamplugh's*, and Mr. *Moline* and *Winstanley*, than between the said *Lamplugh* and the Plaintiff *Tolson*.

The Plaintiff *Tolson* insisted, That the Defendants the *Lamplugh's* claimed and derived their Title under Mr. *Moline* and his Wife, and *Winstanley*, and so the said Depositions ought to be used at the Trial, which the Defendant denied.

This Court declared, That the Depositions in the said former Cause, ought to be used against the now Defendants the *Lamplugh's*, unless they claim under the said

said former Defendants ; but if they do, then the said former Depositions ought to be admitted as Evidence against them.

*Hunton contra Davies, 22 Car. 2.
fo. 386.*

THE Bill is for 500 *l.* Remainder of 2900 *l.* which Mr. *Hugh Ordley* was to pay for the purchase of Land to the Plaintiffs Father, which 500 *l.* was decreed to be paid to one *Castle* in 1637. for the use of the Plaintiff, which 500 *l.* and Interest comes to 1184 *l.* and to have the Defendants the purchasers of the Land to pay it.

Bill for Re-
mainder of
purchase-
Mony.
Defendant
pleads it is
33 years
since, and
never any
Suit for it,
but the
Land enjoy-
ed, and for-
mer parties
concerned
dead ; *per*
Cur' a good
Plea.

To which Bill the Defendants, the Executors of *Ordley*, pleaded, That Mr. *Ordley* lived in *London* till 1662. and the Plaintiff might have had remedy against him, and it being a debt 33 years since, and no Suit commenced against *Ordley* in his life time, nor any till now, and the Lands enjoyed by others now, and the Defendants the Executors have nothing to shew for the payment and Case, and all former parties concerned therein being dead, and therefore after all this time the Defendants hope this Court will not suppose that the said Mony is unpaid, or that the Defendants ought to be charged therewith, and the Defendants being Executors and Strangers

Strangerr to all the Matters aforeſaid.
This Court held the Plea and Demurrer
good.

*Malpas contra Vernon, 22 Car. 2.
fo.360.*

A Bill of Review, to Reverse a Decree, whereby the Plaintiff is decreed to pay more Money than by his Agreement on his Purchase he was to pay. Bill of Review.

This Court declared, That without a special Agreement at the time of the purchase, for payment of the debt claimed by the Defendant, the Plaintiff ought not to be oblig'd by the Decree to pay the Defendants, no such Agreement appearing by the Decree, or any Proof offered at the Hearing.

The Defendant insisted, That by the Proofs there is an Agreement proved, whereby the Defendant, amongst other Creditors was to be satisfied his debt.

Now the Point being, whether any special Agreement was made for the purpose aforeſaid, and the Court had declared no new Proofs could be admitted in the Cause this Court Ordered by consent. That the Cause be heard on the ſaid point of Agreement on the old Proofs, and no other. No new Proofs admitted upon a Bill of Review, upon a ſecond Agreement.

Comes

Comes Castle-Haven contra Underhill,
22 Car.2. fo.106.

Bill of Re-
view.

THis is a Bill of Review, to Reverse a Decree in 12 Car.1. wherein the now Defendant was Plaintiff against the Lady Vice-Countess of St.*Albons*, his Wife and others, Defendants: The points of Error were, That the Decree was grounded on a Bill exhibited by the now Defendant against the said Lady St.*Albons*, his then Wife, and was made by Consent, without any Judicial Hearing, whereby a Settlement and disposition of the said Ladies Lands, whereof she had an Estate in Fee, was made without any Fine or Recovery levied or suffered, or any other legal Act done, to bar and bind her or her Inheritance, which the said Plaintiff conceives could not be done, the said Lady being a Feme Covert, and could not in Law or Equity consent, nor could her Trustees by her consent charge the Inheritance, wherein they had no legal Assurance.

The now Defendants insist, That 2 Car.1. the said Lady St.*Albons*, after her Inter-marriage with the now Defendant, did settle 300 *l. per Annum*, and several Recoveries were suffered, whereby the same would have come to the Defendant after the said Ladies death, as an Estate in Fee,

Fee, the said Lady dying without Issue.

That afterwards the said Lady and the Defendant came to another Agreement, *viz.* That the Defendant should have 400 *l. per Annum* out of the said Ladies Estate, to him and his Assigns for life, and in consideration thereof the said Defendant agreed to quit and debar himself of and from all claim and interest to any of the rest of the said Ladies Estate, real or personal, during their joynt Lives, or after her death; and in case of failure of payment, or the said Ladies death, the Defendant was to enter into all the Estate for Satisfaction; which said 400 *l. per Annum* was settled by Deed Tripartite, 14 *Car. 1.* and the said Agreement and Settlement was confirmed by a Decree 17 *Car. 1.* by the consent of all parties, and that the said Lady by Will gave away from this Defendant all her Lands and personal Estate, which the Defendant had given her power to do, and she died, and for Non-payment of the said 400 *l. per Annum* the Defendant entered upon the Lands, liable to the payment thereof, and the Defendant hopes the said Decree shall not be Reversed.

The Plaintiff insists, That the Title in Law in the Ladies Estate was in Trustees before her Marriage with the Defendant, and so agreed to be continued without his intermeddling therewith, he bringing
no

Revocation
of Uses.

no Additional Estate to the said Lady, and that there was no Fine levied to the Trustees, or otherwise, of her Estate of Inheritance, and that the Uses upon the Recoveries were with power of Revocation in the Lady alone, and that pursuant to such power by Deed, 14 Car. 1. she Revoked the same, and settled the same in Trust for such persons and their Heirs, as she by her Will should appoint, and that the said Tripartite Indenture and Decree did not discharge the Trust, nor take notice of the Recoveries, and that the said Lady in 1659. did appoint, that her Trustees upon the said Recoveries shall convey part of her Land to the Plaintiff *Solmes's* Father, and the Plaintiff *Terrell*, and the rest to her Heir at Law; and that in 1650. the said Land came first to be charged, which was after the Ladies death, and presently after there appeared Infancies, which was the reason the said Decree was not sooner impeach'd.

Bill of Review dismiss'd, This Court being assisted with the Judges, taking into Consideration the length of Time since the Decree was made, and how long they were resting under it without any Complaint, and that the Heirs have a benefit by the Ladies separate power of disposing, who disposed accordingly by her Will.

the Plaintiffs rested under it without any Complaint.

This

This Court, with the Judges, declared and are of Opinion, that the said Decree, grounded on the Tripartite Indenture 14 Car. 1. was and is a good Decree, and ought to be performed ; and dismissed the Bill of Review.

*White cont. Ewens & al', 22 Car. 2.
fo. (237.)*

THis is upon an Appeal from a Decree, Appeal from
the Case being, That Dame *Ann Brett*, a Decree.
Relict of Sir *Alex. Brett*, having a Joynture
in the Manors and Lands of *Whitstanton*,
and *Alexander* her Son having on the
Marriage with *Elizabeth* the Daughter of
Sir *William Kirkham*, agreed to settle
250 *l. per Annum* Joynture on the said
Elizabeth ; but being disabled to do it, by
reason of Dame *Anns* Joynture, he being
seised only of 120 *l. per Annum* in *Whit-*
land, and the Reversion of *Tarkcombe*, the
said *Alexander* agreed with the said Dame
Ann, That his Heirs, Executors, or Admi-
nistrators, should pay yearly after his
death, to Sir *Humfry Lind* and *George*
Brett 250 *l. per Annum* during the said
Dame *Anns* life, if the said *Elizabeth*
should so long live; and thereupon the
said Dame *Ann* Joyned with the said *A-*
lexander in a Grant of a Rent-charge of
250 *l. per Annum* out of *Whitstanton* for
E the

the Joyture of *Elizabeth* and *Alexander*, 12 Jac. 1. demised *Whitland* and *Tarkcombe* to *Lind* and *Brett* the said Trustees for an hundred years, to commence immediately after such time as the Heirs, Executors or Administrators of *Alexander* should fail to pay the said 250 *l.* per Annum to the said Trustees during the life of the said *Elizabeth*.

That 15 Jac. 1. the said *Alexander* died, and there being a failure of payment of the 250 *l.* by the Children, Executors, &c. of the said *Alexander*, to the said *Elizabeth*, or to the Trustees, for the use of the said Dame *Ann*, the said Dame *Ann* paid the same out of *Whitstanton*, and thereby the said Lease of 100 years of *Whitlands* and *Tarkcombe* did commence; and thereupon she entred, and received the Profits of *Whitlands*, and the said Dame *Ann* paid the 250 *l.* during the life of the said *Elizabeth*.

That the said *Alexander* leaving three Children, viz. *Robert*, *Mary* and *Ann* wholly unprovided for, and by Agreement the said Dame *Ann* was to pay 80 *l.* per Annum for the said Childrens Maintenance, from the death of the said *Elizabeth* their Mother; and that the said Dame *Ann* and her Trustees should assign the said Lease of 100 years to the said Children, when at Age.

That

That 17 Jac. 1. the said Lease was assigned to the Children, to commence from 1636. that the said Dame *Ann* paid the said 80 *l. per Annum* maintenance, which with 1750 *l.* she had paid to the said *Elizabeth*, amounting to more than the Value of the said Lease of *Whitlands*, whereof she received the Profits, till about 1636. the said *Mary* one of the Children being dead, and that the Defendant *Ewens* having married *Ann* the other Daughter, they and the said *Robert Brett* the Son held the said premisses as Joynt-tenants by virtue of the said Lease; but the said *Robert Brett* receiving more of the Profits than his share, the Defendant *Ewens* and his Wife sued out a Writ of Partition in 1654. a Moiety was delivered Partition. to the Defendant *Ewens*, and Judgment given, that the same should be held in severalty; and the Defendant *Ewens*, 12 Car. 2. for 132 *l.* Fine, and 20 *l. per Annum*, demised part thereof to the Defendant *Nurse*, who assigned to the Defendant *Rutland*.

That the Plaintiff *White* insisting, That *Robert Brett* acknowledged a Judgment to *Richard White* in 1644. extended the Defendants Moiety, and brought an Ejectment, and got a Verdict by surprize. since which the Defendant brought an Action, and obtained a Verdict, whereupon the

Plaintiff exhibited this Bill, and hath stayed the Defendants by an Injunction.

To have an account of the Profits received, and a Lease 12 *jac.* 1. being 20 years since, is contrary to the Limitations and Rules both at Law and Equity.

The Plaintiff insists, He is now in the place of the said *Robert*, but in a better condition, his said Judgment under which he claims being long since Extended in the life time of the said *Richard White* and *Robert Brett*, and before any Action brought, and if the said Lease be satisfied, the same ought to be set aside: And to take off the length of Time insists, That by a Decree made in the Court of Wards in 1640. the Defendants were to account with the said *Robert Brett*, and the Plaintiffs Father *Richard White* really lent the said Mony for which the Judgment was got; and in 1646. on Extent, had a Moiety of *Whitlands* delivered, and that notwithstanding the Lease to the three Children, the Lady *Ann* had possession of *Whitlands* till 1637.

The Defendants insist, That the Lady *Ann* paid 1750 *l.* and 80 *l.* per Annum, during the Minority of the Children, which is more than the Value, so look'd on her self an absolute Owner, and disposed of the said Lease, whereof the said
Robert

Robert had a *Moiety*, and that this differs from ordinary Mortgages, the Lease being to commence after failure of Payment by the Heirs, Executors or Administrators of the said *Alexander*, and there was no *Proviso* therein, and that the said Lady *Ann* in all probability hath paid many Hundreds of Pounds, and *Elizabeth* might have lived many years longer; and tho' the Lady *Ann* had paid treble the value, yet she must have been contented with her Security, and the said *Robert Brett* did not think the same worth Redeeming; and tho' the Reversion in Fee was Extended in 1646; yet the said *Robert Brett* and the Defendant *Ewens* continued possession till Judgment on the Writ of Partition, and from thence till 1662. which was 20 years after the Plaintiffs Judgment, and the Lady *Ann* was to continue possession till the Children attained 21 years of Age, which was in 1636. when the said demise to them made did commence.

Lease to
commence
after failure
of payment.

This Court being assisted with the Judges, were of Opinion and declared themselves fully satisfied, That the Plaintiff ought not to have any Relief against the Defendants, but that the Bill ought to be dismissed, for that his Lordship doth take a difference betwixt the Lease which is to commence after failure of Payment,

Difference
betwixt a
Lease which
is to com-
mence after
failure of
Payment,
and a Mort-
gage with
a Condition
subsequent.

Redemption
after a long
time.

Plaintiff not
relieved up-
on a Judg-
ment entred

and a Mortgage with a Condition subse-
quent, and the rather in this case, for that
the breach was in the failure of payment
of 250 *l. per Annum*, which the said Lady
was thereby obliged to pay for a young
Life, and so might have been paid for
many years, and if it had been paid in
the Casualty for 20 years, the Heirs would
never have redeemed it, and therefore no
Reason why the Plaintiff should take
advantage thereof; and also the Agree-
ment before mentioned, between the said
Dame *Ann* and *Kirkham* weighed much in
this Court, to which Agreement *Robert*
the Heir, by his Enjoying of the premisses
so assigned, together with the Defendant
Ewens and his Wife, after he came of Age,
consented, and there was no disturbance
during the Tenancy in Common as to the
Right, but to as perception of Profits only,
and the Heir permitting the Defendant
Ewens and his Wife to have Judgment on
the Writ of Partition was a Consent of
the whole, and in this Consent it is not
the Heir, but a Stranger who seeks to
redeem, and no man that puts himself
after so long a time into a condition to
redeem, shall have any Relief here; and
it is the stronger against the Plaintiff, that
no Consideration is proved for the said
ment entred into 60 years ago, and no Consideration proved.

Judgment,

Judgment, which was entred into so long since as the Year 1640, and after 60 years, this Court will not relieve the Plaintiff, but dismiss the Bill.

Boulter contra Chester & al, 22 Car. 2.
to. 60.

THe Question being, Whether the Plaintiff *Boulter*, who was a Surety for one *Ree*, should pay any more than the Sum of 40 *l.* for which he was Bail for the Appearance of one *Roger Ree* at the Defendants Suit, the *Ac etiam* Bill being only for 40 *l.* whenas the Defendant demands 55 *l.* for a years Rent for the premisses, and 10 *l.* damages for want of Repair of the premisses, besides Costs, and would fix the same on the Plaintiffs the Bail; but the main Question being, Whether the Bail ought to answer or pay any more than what was exprest in the Writ, which is 40 *l.* or whether he ought to answer or pay what might have been recovered, in case the said *Ree*, for whom the Plaintiff was Bail, had appeared and defended the Action.

Bail.

Bail to answer no more than what is exprest in the *Ac etiam* Bill.

This Court conceived, that the Defendant *Stretton* ought to have no more than what was exprest in the Writ and *Ac etiam* Bill, for which the Plaintiff was only bail, but his Costs in the same already taxed at Law and by the Master, and ordered the same accordingly.

*Floyer contra Hedgingham, 21 Car.2.
fo. 809.*

That no Copyholder ought to be admitted to any Copyhold Estate by Letter of Attorney, for that he ought not to be to do Fealty at the time of his admittance, admitted by which cannot be done by an Attorney; Letter of but ought to be done in person, by reason Attorney. that no man can swear by Attorney.

Hunt contra Jones, 22 Car.2.

Limitation of a Lease. **T**he Bill is, That the Defendant *Jones*, who is the surviving Trustee may assign and convey all his Interest and Estate in *Brockley* in *Com Worcester* to the Plaintiff, the said Plaintiff intituling her self thereto as Administratrix to *Edward Palmer*; the Plaintiff setting forth by the Bill, That *Edmund*, late Bishop of *Worcester*, did by two Indentures of 30 & 31 *Eliz* demise the premisses to the late Queen and her Assignee, during the several Terms and Rent therein expressed, that the several Estates, Terms and Interests being come and vested in the said *Edward Palmer* for the Remainder thereof; he the said *Palmer* by Deedin 1652, in Consideration of a Marriage then to be had between him and the Plaintiff *Mary*, assigns the said premisses unto *Giles Palmer*

Palmer and the Defendant *Jones*, and their Executors, for the residue of the said Terms upon Trust to permit *Elizabeth Palmer*, Mother of the said *Edward*, to enjoy the said premisses for life, and then to the said *Edward* for his life, and after their Lives, then to the Plaintiff *Mary* for her life, and after their deceases, then to heirs Males of the Body of the said *Edward Palmer* and the Plaintiff *Mary*, and for default of such Issue, then upon Trust for the right Heirs of the said *Edward*, to their own use, benefit, and dispose, as by the said Deed, &c.

That the said *Edward* and *Elizabeth Palmer* being dead, Letters of Administration were granted to the Plaintiff *Mary*, by virtue whereof she is well Intituled to the said premisses, and to the trust and benefit thereof for the Remainders of the said Terms to come, and that the Defendant *Jones*, as the surviving Trustee, ought to assign to the Plaintiff, and the Plaintiff insists, that all the Remainders after her death are void in Law and Equity.

The Defendant *Jones* insists, That the Trust extends to the Child or Children of the said *Edward Palmer*, and the Defendant *Elizabeth Palmer*, an Infant, being his Daughter she may question him for the same, in case he should Assign as aforesaid, and prays the Court will take care for

Limitation
of a Term
in Trust for
heirs Males,
&c. void in
Law.

And the
benefit of
the Trust
belongs to
the Excu-
tor or Ad-
ministrator.

for the Infants. But the Plaintiff insisting, That both in the cases of Executors and Administrators the Point hath been frequently Adjudged, and the Limitation to the heirs Male, or heir General, being a void Limitation in Law, where there is no Executor, the Trust shall come to the Administrator.

This Court declared, That both in Law and Equity the benefit of the Trust in such case doth belong to the Executor or Administrator; but the Plaintiff *Hunt* having married the said Plaintiff *Mary*, and claiming in right of her who is Administratrix to her former Husband *Edward Palmer*, the Court thought it hard, that by virtue of the said Administration she should carry away the Estate to her second Husband, and thereby strip the Infant thereof, from whose Father the Estate first moved, and it not appearing that the Ecclesiastical Court, when they granted the Administration, took any Consideration for a distribution to be made for a provision for her, this Court would consider of the Case, and also of the Limitation and Consideration of the said Deed, and deliver their Opinion.

This Court being assisted with the Judges, it appearing that the Interest and Estate of the Terms and the Trust and Benefit thereof, is by the death of the said
Edward

Edward Palmer and his Mother, come to the Plaintiff *Mary* for her life, and there being but 30 years of the said Term to come, and in regard the Ecclesiastical Court cannot make a distribution of the remainder of the Terms, not knowing but that the said *Mary* may live till the Expiration thereof.

This Court directed the Defendant *Jones* The Trustee to assign and transfer the premisses and all his Interest therein, &c. in the said Terms to the Plaintiff, or such as they should appoint.

The Trustee decreed to assign to the Administratrix.

Darrell contra Whitchot, 20 Car. 2.
fo. 516.

THE Plaintiff had a Trust in a Lease of a Coal Farm by Patent from the late King, which Lease was afterwards renewed by the King, and other Trustees named therein, and the Defendant being one of the Trustees, insists, he was a joynt Patentee for the valuable Consideration of 500*l*. But the Plaintiff insists, The Defendant comes in as the Plaintiffs Trustee, and not to be subject to the same Trust in the New Lease, as he was under the Old Lease.

Trust.

But the Defendant insists, The New Patent was to the New Trustees for Service done by them to this King, and this

Defen-

Defendants 500*l.* and this Defendant was not Trustee for the Plaintiff, but was in for his own use, which Patent this Defendant had pleaded, and was allowed.

An Old Trust continued upon a new Lease or Patent. No Tenant Right against the King.

Mortgagee, or Trustee, renewing a Church-Lease, the *Cestuy que Trust* relieved. Bill dismiss.

Yet the Plaintiff insisted, There was a continued Trust, and the Defendant and the King declared, he had a respect for the Old Tenants, and the Defendant coming in under the Tenants Interests, ought to be in Trust for the Plaintiffs, and that tho' there be no Tenant Right against the King; yet the King did consider the Tenants, and that this Case is but the same with that where a Mortgage or Trustee renews a Church Lease, in which Cases this Court had given Relief.

This Court with the Judges declared their Opinion, That there was no ground at all to Relieve the Plaintiff, and so dismissed his Bill.

Episcopus Sarum contra Nosworthy,
23 Car. 2. fo. 720.

Arrears of Rent.

THis Case is touching a Rent of 67*l. per Annum* reserved on a Lease of Lands made by *John* late Bishop of *Exon* to the Defendant, and the Plaintiff by his Bill says, the Defendant never paid the said Rent to the Plaintiff, nor any part thereof during all the time he was Bishop of *Exon*, which was for 6 years, whereby

a great Arrear is incurr'd and due to the Plaintiff from the Defendant, for which the Plaintiff seeks Relief.

The Defendant insists, That he directly rendered the said Rent to the Bishop, while he was Bishop of *Exon*; but he refused the same, having an intention to impeach the said Defendants Estate; and now the Plaintiff is Translated to another See, and so he ought not in Law or Equity to demand the said Arrears, but ought to be debarred from receiving the same by his refusal, as aforesaid.

His Lordship was clear of Opinion, that by Law the Plaintiff could not recover the said Arrears, but how far the Plaintiff was relievable in Equity was the question, and his Lordship ordered Presidents to be produced, where there hath been a Just duty, but no Legal remedy, and ordered a Case to be stated.

It appearing that the Plaintiff, while he was Bishop of *Exon*, would not accept of the said Rent, his Lordship, with Judges assisting him, were clear of Opinion, That there was no ground in Equity to give the Plaintiff any Relief, and dismiss the Bill.

Barthrop

*Barthrop contra West; 23 Car. 2.
fo. 744.*

Assets.

THe Plaintiffs Suit is to have the benefit and equity of Redemption of Leases mortgaged, and other Trust Estates, made liable for the payment of his debt, being on Judgment for 2000 *l.* and to have a voluntary Deed of Trust set aside, as against the Plaintiff.

Equity of
Redemp-
tion.
Assets.

This Court decreed the Plaintiff to have the Equity of Redemption to be liable, and as Assets to satisfy his said debt of 2000 *l.* and set aside the said voluntary deed of Trust, and all Trust Estate and Surplus thereof after preceding debts paid, to be Assets in Equity for the payment of the Plaintiff:

*Hooker contra Arthur, 23 Car. 2.
fo. 523.*

THe Defendant having recovered damages for breach of a Covenant in a Lease, at Law, but the Plaintiff insists, That there is not so much damages due, as the Defendant hath sworn in his Answer, therefore the Plaintiff hopes this Court will reimburse him what is overpaid to the Defendant.

This

This Court declared they would not try nor ascertain the damages in this Court, but ordered the parties to Law on the Covenant.

The Court of Chancery will not try or ascertain damages recovered at Law.

Domina Kemp contra Kemp, 23 Car. 2.

This is on a Case stated, (*viz.*)

That upon Articles of Agreement between Sir Robert Kemp and Thomas Steward, the Plaintiffs Father upon the Marriage of Sir Robert with the Plaintiff; it was agreed 500*l.* Marriage portion, should be paid unto Sir Robert or his Executors, and in consideration thereof, the said Sir Robert should settle a Joynture of 200*l. per Annum* on the Plaintiff his wife, and if the said Sir Robert should dye before such Joynture settled, then he was to have Lands chargeable with the Plaintiff Dower, which should fully recompence the 200*l.* and that Sir Robert by his last Will devised to the Plaintiff, a Rent-charge of 200*l.* for her life, to be issued out of the Mannor of *Spenisball* and Lands thereto belonging, and of certain Farms called *Lininlts* and *Mortimore*, and *Ravels*, and the *Frywoods*, in full satisfaction of the said Articles, and all Dower claimable by the Plaintiff, and also devised the said Farms unto the Defendant Mary his

200 l. Rent-charge devised in lieu of Joynture, and by the same Will an implicit Devise of the Lands to her. Decreed she shall have only the 200 l. per Annum.

his Grandchild; To have and to hold immediately after the death of the Plaintiff his Wife, and by a subsequent Clause in the Will, he devised all the Lands (not therein before disposed of) to the Defendant *Thomas Kemp*, the Father for life, Remainder to *Thomas* his Son for life, with remainder over; and also gave the Plaintiff his Coach, Horses, Plate and Jewels, &c. and one Third part of his clear Personal Estate: And the Plaintiff conceived, that she ought by the Will to have both the Rent-charge and the Farms for her life by the aforesaid devise, viz. where the same are devised to the Defendant *Mary*, To have and to hold after the Plaintiffs death, so to have the same by the said implicit Devise, without Extinguishment of the said Rent-charge is the Plaintiffs suit.

This Court declared, they saw no Cause to decree both the Rent charge of 200 l. per Annum, and the Farms aforesaid, to the Plaintiff, but the Rent charge of 200 l. per Annum to the Plaintiff only.

Boucher

Boucher contra Antram, 23 Car. 2.
fo.(97.)

THe Bill is, That *Alice Lowman* the Plaintiff *Katherines* late Mother, did in *Decemb. 1669.* by Will give and dispose unto the Plaintiff *Katherine* a Legacy of 160*l.* and made the Plaintiff, who married another of the Daughters, Executor.

The Defendant insists, That the Testatrix made her Will in these words, *viz.* *Item, I give unto my Daughter Katherine Boucher* the sum of 160*l.* for her to have the use of it during her life, and her Child or Children to have it after her decease; but if she happens to dye, leaving no Child surviving her, I Will that the said 160*l.* shall be to and for the sole benefit and use of my Daughter *Elizabeth Antram* and her Children, which *Elizabeth* is the Defendants Wife, and the Defendant is willing to pay the said 160*l.* to the Plaintiffs, or either of them, he being secured against the title and claim of the surviving Child or Children of the Plaintiff *Katherine*, and if she should die leaving no Child or Children behind her, then against the Title of said *Elizabeth* and her Children.

F

This

Personal
Estate devi-
sed to one
for life, and
after to her
Children;
and if they
have no
Issue, the
Remainder
over, is a
void Devise
as to the
Remainder.

This Court decreed the Defendant to pay unto the Plaintiff 160 *l.* with full Interest; but as to the Clause on the Will which directs, That for want of Issue by the Plaintiff *Katherine*, the said 160 *l.* after her decease shall be to and for the benefit and behoof of the Defendants Wife and her Children.

His Lordship declared, it being a Personalty, is in the nature of a Perpetuity and so a void devise, and therefore the Defendant, nor his Wife and Children, ought to have any benefit thereby, but be debarred from the same, and that the said 160 *l.* ought to be absolutely vested in, and come unto the Child or Children of the Plaintiff *Katherine*, and decreed the same accordingly.

Chambers contra Greenhill, 24 Car. 2.
fo. 288.

Bill of Re-
view, be-
cause the
Plaintiff can
now prove
a Tender
and Refusal,
which he
could not
prove be-
fore, dismiss.

A Bill of Review brought by the Plaintiff, to Reverse the Decree in this Cause, the Plaintiff would now Examine to a matter of Tender and Refusal, which he could not prove before the Hearing, but since the Decree signed and inrolled he can prove it.

The Court ordered Presidents to be searched, which being produced by the Plaintiff, his Lordship declared the said Presi,

Presidents seemed of no weight to the Plaintiffs purpose, and dismissed the Bill of Review.

Crofter contra Wister, 24 Car. 2.
fo. 688.

THe Defendant insists, The Plaintiff ^{Bill of Re-}
ought not to have brought a Bill of ^{viver.}
Reviver in this Case, but to have taken
out a *Subpæna* in the nature of a *Scire*
facias to revive the Decree, the same being
signed and inrolled in the life time of
the Plaintiffs Testator; therefore the De-
fendant demurs to the said Bill.

The Plaintiff insists, It is at the Plain-
tiffs election to revive the said Decree
inrolled, and to have Execution thereof
by Bill or *Subpæna* in the nature of a
Scire fac': And as this Case is, the whole
Proceedings could not be revived by *Sub-* Revivor by
pæna, in regard several Proceedings have ^{Bill, or by}
been relating to Costs since the Decree, ^{*Scire fac'*,}
which proceedings can be only revived by ^{when pro-}
Bill, and therefore the most proper course ^{per,}
was, to revive all things by Bill.

This Court held the said Bill to be well
brought, and held the Demurrer insuffi-
cient.

Stoell contra Botelar, 24 Car. 2.
fo. 390.

Supplicavit
of the Peace
on Petition,
and not on
Motion nor
any Indorse-
ment on the
back there-
of; yet
good.

THat a Writ of *Supplicavit* of the Peace, issued against Sir Oliver Botelar, upon a Petition and Articles exhibited by the said *Stoell*.

The Defendant insists, The said Writ issuing on Petition, and not on a Motion in Court, nor any Indorsement made on the back of the Writ, as by the form of the Statute is required, and but three of the said Articles are sworn to by the Articulate, so it is irregular.

This Court on reading Presidents, notwithstanding the Objections aforesaid of *Botelar*, was fully satisfied, that the *Supplicavit* was well granted and warranted.

Monnins contra Dom' Monnins, 24 Car. 2.
• fo. 85. (178.)

Demurrer to
a Bill for
discovery,
whether the
Defendant
be married

BILL is to have the Defendant to discover, whether she be married since the death of Sir Edmond Monnins her late Husband: The Defendant demurred, for that in case she was married since the be married or not, good; for that if she be married it would be a forfeiture of her Estate, and the Bill dismiss.

death

death of her said Husband, the same amounts to a forfeiture of her Estate and Interest in several goods and things, devised to her by the Will of her said Husband, to be held and enjoyed by her during such time as she should continue her Widowhood, and so ought not to discover as aforesaid.

This Court held the Demurrer good, unless the Plaintiff produced Presidents, which the Plaintiff could not; so the Bill was dismissed with Costs.

*Warren contra Johnson, 24 Car. 2.
fo. 543.*

THat *Mary Warren*, the Plaintiffs Grandmother, put 60 l. into the Defendants hands in trust, for the benefit of the Children of *Mark Warren* her Son, who at that time had but three Children, whereof the Plaintiff was one; but now hath six Children.

This Court is of Opinion, That the said 60 l. belonged only to the Children of the said *Mark Warren*, which he had by his then Wife at the time when the said Mony was given, and decreed the same accordingly.

Mony in Trust for the Children of I. S. it shall be for the benefit only of the Children that he then had, and not born afterwards.

*Wallop contra Dominam Hewett, 24 Car.2.
fo. 218.*

Legacies
given by a
Will and a
Codicil, and
are distinct
not one and
the same.

THe Plaintiffs *Henry* and *John Wallop*
seek Relief for 400*l.* viz. 200 *l.*
apiece Legacy, given them by the Will and
Codicil of the Lady *Crofts*.

The Case is, That the Lady *Crofts* by
her Will gave the Plaintiffs 100 *l.* apiece,
and afterwards by a Codicil annexed to
her Will gave the Plaintiffs 100 *l.* a-
piece.

The Question is, Whether the said Legacies
so given be one and the same, or distinct
and several Legacies, or what her Intention
was in reference to the same, and desire the
Judgment of the Court therein.

This Court, with the Judges, on Read-
ing the said Will and Codicil were of Opi-
nion, and satisfied, That the said Legacies
in the said Will and Codicil mentioned
are not one and the same, but distinct
and several Legacies of 200 *l.* and de-
creed the Defendants to pay the said
Plaintiffs 400 *l.*

Thorne

Thorne contra Newman, 24 Car.2. fo. (371.)

§ 24 Car. 2. fo.8.

That *Nicholas Burnell*, Father of the Defendant *Margaret Newman* being seised of the premisses in 1652. demised the same to *Elizabeth Stone* for 99 years at a Pepper-Corn, with a *Proviso* to be void on payment of 590 l. and the said *Elizabeth* died and made *Elizabeth Wheat* her Executrix, and *Thomas Baker* marrying the Defendant *Margaret Newman* in November 1657. *Elizabeth Wheat* and the said *Nicholas Burnell* Assigning the premisses to *Thomas Baker*, and the said *Baker* for 500 l. borrowed of the Plaintiff, Assigned to one *Minterne* in Trust for the Plaintiff in 1659, and *Baker* failing in payment contracted with the Plaintiff for 770 l. more, that he would give his Interest in the premisses absolutely, without any power of redemption, and *Baker* and *Minterne* did joyn accordingly in 1660.

And the Plaintiff insists, That the Defendant claims the premisses by a Deed dated the 19th of August 1659. whereby it is pretended, That by Indenture made between the said Old *Burnell* of the one part, and *Thomas Lewis* and *Bartholomew Pickering* of the other part, the said *Burnell* in Consideration of the Natural love and

Term
drowning
in a Free-
hold.

affection to the said *Margaret*, and for the settling and confirming of the premisses for the uses therein, and for 5 s. Covenanted to stand seized of the premisses to himself for life, Remainder to the Defendant *Margaret* for life, then to the Wife of the said *Thomas Baker*, Remainder to the Heirs of her Body, with Remainders over, and the said *Burnell* dying in 1659. the premisses then vested in *Margaret*, and that *Baker* in her Right became seised of the Freehold thereof, and that thereby the Remainder of the said term of 99 years was drowned, and so the Assignment to *Minterne*, and the Assignment by *Baker* and *Minterne* to the Plaintiff was void, and so the Plaintiff a purchaser for 1300 l. like to be defeated.

And the Plaintiff further insists, That if the said Deed were ever sealed, it is with a *Proviso* of Revocation, to be void on payment or tender of 12 d. to *Lewis* or *Pickering*, or either of them in the *Middle-Temple-Hall*, and that *Burnell* did tender 12 d. to *Lewis* with intention to make void the said Deed, and declared so to *Lewis*, that she did revoke the said Deed, and pulled the Seal off from it, and that a *Memorandum* was Indorsed on the back-side of the Deed, That there was 22 Octob. 1659. 12 d. tendered to *Lewis* to revoke the said Deed; but the Defendants pretend,

tend, because the 12 *d.* was not rendered in the *Middle-Temple-Hall*, therefore the Revocation was not legal, and so the said Deed still in force, and the Plaintiffs Estate drowned.

The Defendants admit the Case to be as aforesaid, but insist, That the said Deed 19 Aug. 1659. was intended for a Settlement on the Defendant *Margaret*, for a provision for her after the death of the said *Baker* her Husband, he having not made any Joynture, and that the said Defendants claim the premisses by the said Deed, whereby immediately upon the death of *Burnell*, the Freehold of the Premises vested in *Baker* in right of the said *Margaret* his Wife, and so the Plaintiffs Estate was drowned, and that *Baker* was not by intention of the said Deed, to sell away the premisses for any longer time than his own life without the said *Margaret's* Consent, and Joyning with him in a Fine thereof.

And the Defendants further insist, That the 12 *d.* ought to have been rendred in the *Middle-Temple Hall*, else the Deed must be in force; and if any *Memorandum* or Declaration were made, as aforesaid, the same was done out of design only, to have the said *Baker* make the said *Margaret* a Joynture.

But

But the Plaintiff insists, That he ought to hold the said premisses for the residue of the said term for 99 years against the said Deed.

Voluntary Deed set aside against a purchaser. This Court was satisfied, That the Plaintiff ought in Equity to enjoy the premisses against the Defendants, and that the said Deed ought to be set aside, as against the Plaintiff; but the Defendants are to redeem.

Conveyance with power of Revocation on payment of 12 *d.* at such a place, 12 *d.* was tendered at another place, with exprefs declaration to revoke the Deed. The Bill being to set aside a pretended voluntary Conveyance set on foot by the Defendant, which Deed is with power of Revocation upon the tender of 12 *d.* and the 12 *d.* was tendered accordingly with intent to revoke the said Deed, and the said Deed is accordingly Cancelled; but the Defendants, in respect the 12 *d.* was not tendered at the place appointed, set the said Deed up at Common Law, and upon a Trial at Law, without any defence made by the Plaintiff, the Defendants were Nonsuited, and the Plaintiff being a purchaser of the premisses, first by Mortgage for 500 *l.* and afterwards by absolute Assignment for 770 *l.* more.

The Lord Keeper, upon reading the said Cancelled Deed, saw no cause to alter the Master of the *Rolls* his Decree aforesaid, but ordered the same to stand Confirmed.

Comes

Comes *Sterling* contra *Levingston*,
24 Car.2. fo.113, & 432.

That Sir *Peter Vanlore* the Elder being seised in Fee of the Lands, by Deed Covenanted to stand seised thereof to several uses, under which all parties to the Suit claim several parts of the premisses; and here being a *Proviso* in the said Deed, That if young Sir *Peter Vanlore*, or the Issue (whose Issues and Heir the now Plaintiffs are) should attempt to impeach the said Settlement, that then the uses to him and them limited by the said Deed should be void, and that by the death of several persons, several parts of the premisses were accrued to the said Plaintiffs, but that by reason of the said *Proviso* and several Ambiguities in the said Deed, it was doubtful to what parts the Plaintiffs, the Heirs general, were intitled unto, so to be protected against the said *Proviso*, and to have the partition of the Lands is the Bill.

Settlement with *Proviso* not to attempt the impeachment of it. Court directed a Trial at Law, and that the Trial should be no forfeiture.

His Lordship declared, it was most fit that a Trial at Law be had touching the Plaintiffs Right and Title, and that such Action to be brought shall not be taken or construed a breach of the *Proviso* aforesaid, or forfeiture of the Plaintiffs Right and Title to the premisses.

Smith

Smith contra Sallett, 24 Car. 2.
fo. 382.

THE Bill is to have an Issue directed by this Court, to try whether the Fines of the Copyholders, due to the Lord of the Mannor, were certain or arbitrary.

Fines of Copyholder, whether certain or arbitrary; it having been tried at Law, the Court would not relieve the Plaintiff, other than for the preservation of Witnesses.

The Defendant insisted, That there had been several Trials already, and Verdicts have passed for a Fine certain, and particularly, one in Ejectment before Mr. Justice *Windham*, and another before the Lord Chief Justice *Hales* upon a Special Issue, directed out of the *Exchequer*, Whether the Fines were certain at 8 *d.* an Acre, and 8 *d.* a Cottage, or not? And a Verdict passed on both Trials for a Fine certain.

This Court declared, They could not relieve the Plaintiff in Equity, other than for the preservation of Testimony, and dismissed the Plaintiffs Bill.

Lewis

Lewis contra Lewis & al, 24 Car. 2.
fo. 664.

This is on a Case stated, *viz.*

THat the Lord *St. John* and his Trustees demised a Lease on the premisses for 99 years, unto the Defendant *Turner*, if the Plaintiff *Alice*, then Wife of Dr. *William Lewis*, and *Theodore Lewis* Son of the said Dr. *Lewis*, and one *Feilder*, or either of them should so long live. That this Lease was made at the nomination of, and in Trust for the said Dr. *Lewis*: That after in *July* 1666. the Doctor made his Will, and as to the premisses devised them to the said *Alice* for life, and after her death then to the said *Theodore Lewis*, to be disposed of as the said Doctor shall appoint them by his Will in writing or Deed, and of his Will made the said *Alice* his Executrix: That in *March* 1667. by a Declaration in writing, to which the said Doctor and the Defendant *Turner* are parties, and executed by them both, the Trust of the premisses was thus declared, *viz.* for the said Doctor for life, afterwards for such person or persons as the said Doctor by his Will or Deed should appoint, and in default then for the Executors or Administrators of the said Doctor: That in *July* 1667. the Doctor died without making any other Will or Deed, or other
Ap

Will.

Parol Declaration of ones Intent, not good against a Declaration in writing.

Appointmen, for the disposing of the premisses: That *Alice*, by virtue of the said Will and Deed, entred and possessed the premisses: That it appears also in the Case, some Proof was offered touching a Parol Declaration of the said Dr. *Lewis* his Intention, that the Son *Theodore* should have the benefit of the said Lease; but that being by Parol against a Declaration in writing, the Court conceived it not material in the Case; and that it is also in the Case, that the said *Theodore* claimeth so much of the term as should be behind at the death of the said *Alice*, and that the said *Alice* claims the whole term, as Executrix to the said Dr. *Lewis*.

Trust of a term devised to J.S. and then to J.D. to be disposed of as the Testator should appoint by his Will or Writing. He makes a Writing, and declares it to himself for life, and after to such persons as he should by Will or Deed appoint, and for default of that, to his Executors, and made no other Will or Deed, the Executor shall have it.

The Court at the first Hearing was assisted with the Mr. Justice *Atkyns*, who inclined to be of Opinion for the said *Theodore*, and that the said Defendant *Turner*, the Trustee, ought to execute the Trust for him: But his Lordship differing in Opinion, and having since advised upon the Case with Mr. Justice *Windham*, and several other of the Judges, who were all clear of Opinion, That according to the Declaration in writing, the Plaintiff *Alice*, the Executrix, is well intituled to the benefit of the said Lease.

and declares it to himself for life, and after to such persons as he should by Will or Deed appoint, and for default of that, to his Executors, and made no other Will or Deed, the Executor shall have it.

This

This Court therefore doth decree, That *Turner* the Trustee do execute the trust, and convey and assign the said Lease, and the remainder of the term therein, to the Plaintiff *Alice* or whom she shall appoint.

Lance contra Norman, 24 Car. 2.
fo. 233.

THe Plaintiff *Lance* his Suit is, that the day before the Marriage of the Plaintiff and his Wife, the said Plaintiffs Wife was perswaded to enter into a Recognizance of 2000*l.* without defazance to the Defendant *Norman*, being the Plaintiffs Wives Brother, to which the Plaintiff was not privy or consented, which Recognizance the Plaintiff seeks to have set aside and vacated.

The Defendant *Norman* insists, That the Plaintiff was Suiter to his Sister designing to gain her Estate, but she not likely to have Children, intended the said Defendant *Norman* part of her Estate; and upon that account gave the said Recognizance, and at that time the said *Norman* was in the Country, and no ways knowing of it, nor had contrivance in it, but the said Plaintiff proving unkind to his Wife, and turned her out of doors, and parted with her, not making any provi-

provision for her; This Defendant hath put the same in Suit.

The Plaintiff insisted, that his said Wife voluntarily absented from him, and took and conveyed away great part of his Estate, and hath acted as a most insolent and undutiful Wife, and entred into the said Recognizance without his privity.

This Court being assisted with the Judges was satisfied, that the said Recognizance was entred into the very day before Marriage without defezance or the Plaintiffs privity, whereby to defraud the Plaintiff, and one witness only deposed the Plaintiffs consent to the drawing the said Recognizance, who hath an Assignment of the same to himself.

A Recognizance entred into by the Wife the day before Marriage, set a side and a perpetual injunction.

The Court decreed the said Recognizance to be set a side, and vacated on the Record thereof, and a perpetual injunction is granted against it, and this Court proposed on the said Plaintiffs Wives returning back all the Estate which she took and conveyed away, that the Plaintiff do allow her 20*l.* *per Annum*, which was consented to by the Plaintiff, for her separate maintainance.

Howard

*Howard & Uxor contra Hooker, 2 Car. 2.
fo. 587.*

Bill is to set aside a Deed made by Frandulent the Plaintiff *Eliz.* in Feb. 1666. be- Deed. fore her Marriage with the Plaintiff Sir *Philip Howard*, and that the Plaintiff Sir *Philip*, in right of his said Wife might have all her benefit and interest in or to the Estate of Sir *John Baker* her former Husband, and receive the Rents and profits of the premisses.

The Case being, that Sir *John Baker* the Father being seized in Fee of Lands by two Deeds Tripartite of Lease and Release made between himself of the one part, Sir *Robert Newton* deceased of the second, and Sir *John Baker* the Son and Dame *Eliz.* the Plaintiff, and sole Daughter of Sir *Robert Newton* of the third part, in consideration of a Marriage between the Plaintiff Dame *Eliz.* and Sir *John Baker* the Son, and 4000 l. portion, conveyed the same to Sir *Robert Newton* and his Heirs, part of which Lands were for the said Dame *Eliz.* Joynture; and Sir *John Baker* the Father, and Dame *Mary* his Wife being dead, Sir *John* the Son sold part of the premisses for payment of debts, part whereof was the Joynture of Dame *Eliz.* and in consideration of the

G

said

said Dame *Elizabeth* joyning in such sale, and parting with her Joynture, Sir *John* her Husband in lieu thereof, and of 1500 *l.* to be paid to Dame *Elizabeth* for a Joynture-house, limited the premisses unfold to the said Dame *Elizabeth* and the Defendants for 400 years upon Trust, by Sale thereof to pay the said Dame *Elizabeth* the said 1500 *l.* and also the Rents and profits of the whole until Sale, and the residue of the said premisses remaining unfold to Dame *Elizabeth* during her life, and after to wait on the Inheritance. And in 1658 the Inheritance was conveyed to Sir *Robert Newton* and his Heirs, and he by Will devised the same to the said Dame *Elizabeth* for life, Remainder to the first Son of the Plaintiff Sir *Philip* and Dame *Elizabeth*; so the Plaintiff being intitled to the 1500 *l.* and the term of 400 years after the Trusts performed, and so ought in right of the said Dame *Elizabeth* his Lady, to continue in the possession of the premisses, and receive the Rents and profits thereof, which the Defendants refused to do, pretending the term of 400 years is limited to them upon other Trusts, and in particular that the Plaintiff Dame *Elizabeth* before her Marriage to the Plaintiff Sir *Philip*, by her Deed of the 9th of February 1666, Assigned to the Defendants all monies then due, or to be pay-

payable to her by vertue of the Deed in Trust for her benefit, and to be at her disposing during the Joynt lives of her and the said Sir *Philip*, whether she Married or continued Sole, and that she should have power by writing under her Hand and Seal to dispose thereof, for the benefit of her Daughter by her former Husband, and that she hath disposed thereof accordingly, which said Deed the Plaintiff insists is fraudulent or with power of revocation, and never mentioned to Sir *Philip*, and that Sir *Philip* after his Marriage settled 500 l. per Annum, on the said Dame *Elizabeth* for a Joynture, which he would not have done, if he had known or understood the said Dame *Elizabeth* had made such Deed or disposition as aforesaid of her former Husbonds Estate; and since their Marriage she desired leave of Sir *Philip* that she might receive the Rents and profits of the said Lands of her former Husband without mentioning the said Deed, and therefore the same ought to be set aside.

The Defendants do insist, the said Dame *Elizabeth* before her Marriage with the said *Philip* did declare to him that who ever did Marry her should have no benefit of any Estate that she had by her former Husband, and that Sir *Philip* did agree to bar himself thereof, and take no benefit

A Widow makes a Deed of her former Husband Estate and marries, the second Husband not privy to it; the Deed set aside, and the second Husband to enjoy the Estate.

thereby, and that Sir *Robert Newton* looking upon the Estate as settled on his Grandchildren as aforesaid, and had given his personal Estate and 700 *l. per Annum* to the Plaintiffs and their Sons, and the said Sir *Philip* in all the life time of the said Sir *Robert Newton* never pretended right to the said Estate, or intermeddled therewith, that there is no reason to set aside the said Deed of the 9th of *Feb.* aforesaid.

This Court being assisted with the Judges on reading the said Deed, it not appearing unto this Court that the said Sir *Philip* had any notice of the said Deed 9th of *Feb.* 1666: till after the death of the said Sir *Robert Newton*, which was several years after the Marriage, nor was privy or consented to the making of any such Deed; but haveing intimation that Dame *Elizabeth* intended to dispose of her interest in her former Husbands Estate, from such Husband as she should Marry, broka off the treaty of Marriage, which was afterwards brought on again by some Friends of the said Dame *Elizabeth*, and that the said Sir *Philip* was induced to Marry the said Dame *Elizabeth*, upon the hopes and confidence of having the interest she had in the Estate of the said Sir *John Baker* her former Husband, without which he would never have married her, and

and that the said Sir *Philip* never knew of the said Deed of the 9th of *Feb.* 1666, but the same was a fraud upon Sir *Philip*, and that therefore no use ought to be made thereof. and decreed the said Deed of the 9th of *Feb.* 1666, be absolutely set aside, and no use to be made thereof against the said Sir *Philip*, or any claiming under him.

Poter contra Hubbert, 24 Car. 2.
fo. 591.

THis Bill is to have a redemption of Mortgage. a Mortgage made in 1636, by the Plaintiffes Father, to one *Abraham Dawes* for 5000*l.* and for non-payment of the Mortgage mony, Sir *Thomas Dawes* Son and Heir of the said *Abraham Dawes*, entered in 1641, and he and his Assigns have ever since taken the profits. And the Defendant insists, that the said *Thomas Dawes* in 49 conveyed the mortgaged premisses, to *Hugh Hubbert* the Defendants Father for 7000*l.* and that in 1641, when Sir *Thomas Dawes* entered there was 5000*l.* due on the Mortgage besides interest, so he would be charged without 350*l.* per Annum, for mean profits since that time, and would have 6*l.* per Cent. Interest for the 7000*l.* from the time it appearing on the conveyance.

Computati-
on of inter-
est monies
according
to the Sta-
tute in force.

This Cause being first heard by Judge *Ransford*, who ordered the Plaintiffs to redeem, and the account for the Interest of the 500 *l.* to begin from 1636, the time of lending the mony, and from that to 1642 Interest to be paid according to Acts then in force, and from 42 to 46 Interest at 8 *l.* and 4 *l.* per Cent.

The Cause being heard again by the Lord Keeper *Bridgeman*, assisted with Judge *Tyrrle*, *Morton* and *Wild*, who ordered the Plaintiff to pay interest for for the 5000 *l.* to 1641. at 8 *l.* per Cent. and from 41 to 49, the certain profits of the Mortgaged premises to go in discharge of the interst till that time, and that if the remaining interest with the 5000 *l.* should in 49 amount to 7000 *l.* then the Plaintiff to pay Interest for 7000 *l.* else only for so much as the principal and Interest, according to the Statutes in force.

This Cause was again Reheard by the Lord Chancellor *Shaftsbury*, assisted with Judge *Vaughan*, and Judge *Ransford*.

The Defendant insisted, that setting of the interest against the certain profits from 41 to 49 as aforesaid, was a great advantage to the Plaintiff, and that after so long a time the Plaintiff ought not to be permitted to redeem.

This

This Court nevertheless was satisfied, That the Plaintiff ought to redeem, and the Matters now in Controversie being, Whether the certain Profits of the premisses shall go against the Interest from 41 to 49, or not; and whether the Plaintiff shall pay Interest for any more than the 50000*l.* first lent, or not; and what Interest he shall pay at least during the hard times of War.

This Court on hearing Presidents was clear of Opinion, That the Setting the certain Profits of the premisses against the Interest from 41 to 49, ought to be discharged, and decreed the same accordingly. The certain Profits of the premisses, set against the Interest.

And touching that Point, for what Monies the Plaintiff shall pay Interest, either for the 5000*l.* only, or any greater Sum.

This Court with the Judges were of Opinion, That the Plaintiff ought not to pay Interest for any greater Sum, than only for the 5000*l.* the Original Mortgages: This Court declaring, there is no Reason to give Interest upon Interest, and that the now Defendant ought not to be in any better condition than Sir Abraham Dawes the first Mortgagee. Interest upon Interest.

Crisp contra Bluck, 25 Car. 2.
fo. 357.

Bill of Re-
view.

Bond and
Judgment
after upon
it, and the
Principal
and Interest
far sur-
mounted
the Penalty
when Judg-
ment was
entred; how
payment of
Monies shall
be applied
in such case.

THis Case comes to be heard upon a Bill of Review, and an Appeal from a Decree made by the Lord Chancellor *Shaftsbury*; the Plaintiffs Original Bill being to be relieved against a Bond of 1600 l. penalty for payment of 1000 l. and Interest, entred by the Plaintiffs Father, the Testator and others, to *William Bluck* the younger in 1642. The Defendant commenced Suit on the said Bond in 1662. and had Judgment thereupon against the Plaintiffs Father only, and the Principal and Interest due on the said Bond far surmounting the Penalty when Judgment was obtained, and the Defendant being 20 years kept out of his Mony, but having received several Sums in part since the Action at Law brought, it was decreed, That whatever Monies were received before the Judgment actually entred, should be taken in discharge of the Interest of the said 1000 l. Original debt, and that the Defendant should be satisfied after the Judgment entred, the whole Mony thereupon recovered with damages from the time the Judgment was actually entred, deducting what he had received since the actual entry of the Judgment.

Judgment, and allowing his Costs at Law, and moderate Costs in this Court: And it was found, that the Judgment was not actually entred till the Vacation after *Michaelmas* Term 1662. and so only 250 l. paid in *November* 1662. was accounted Interest of the Original debt, and not towards the Mony recovered by the Judgment, and the Account was so settled and decreed, and the Mony paid accordingly. Yet for Reversal of the said Decree, the now Plaintiff for Error assigns, that the same tends to the invalidating of the Course of the Court of *Kings Bench*, it being by the Decree admitted, that the said Judgment was entred in the Vacation after *Michaelmas* Term 1662. and not before. Whereas it is evident by the Records of the *Kings-Bench*, the said Judgment was entred on Record in *Michaelmas* Term 1662. and by construction of Law is supposed and presumed to be Recorded the first day of that Term, against which Record no Evidence or Averment ought to be admitted, and all Monies paid after the first day of that Term, ought in Equity to be applied towards satisfaction of the Judgment, and so the 250 l. paid in *November* 1662. in part of a debt in question ought not to go to satisfy the Interest, but in part to discharge the Principal.

Whether Mony paid shall be applied to discharge Interest of the Original debt, or towards satisfaction Recovered by Judgment on the same Bond. Judgment, when said to be entred.

The

If entred
before the
Effoin-day
of the sub-
sequent
Term,
ought to be
accounted a
Judgment
of the
preceding
Term.

The Lord Chancellor *Shaftsbury* was of Opinion, That no Notice could be taken of any actual entry of any Judgment at Law but that every Jugment whensoever entred, if before the Effoin day of the subsequent Term ought to be accounted a Judgment of the first day of the Term before, and allowed and held the said Error to be good, and decreed the 250 *l.* paid in *Nov.* 1662. should go and be applied as part of satisfaction of the 1600 *l.* and damages due on the Judgment, and what other Monies were paid by any other of the Obligors, their Heirs, Executors, Administrators or Assigns, since the 20th of *October* 1662. if not paid on other account, shall be applied in further satisfaction of the said Judgment, first to discharge the Interest, and then to sink the Principal, and as to so much did reverse the said Decree, and the Defendant appealed from this said Decree to the Lord Keeper *Finch*, and insisted, That by his Answer to the Original Bill, said, when the 250 *l.* was paid, the Judgment was not entred, and presently after Hearing the Original Cause, the late Lord Keeper *Bridgman* calling to his Assistance the Master of the *Rolls*, who declared, That the Defendant should not account for any Mony, as received on the Judgment, until the said Judgment (which was his Security) was really and actually

actually entred, if the Plaintiff insisted as before, which was Over-ruled; and the Plaintiff then brought a Bill of Review; to which the Defendant pleaded and demurred, and thereupon the Lord *Bridgman* declared the Decree to be Just, as to the 250 *l.* and the Decree made by the Lord *Shaftsbury* is to unravel the Account settled, and to charge the Defendant with 4000 *l.* when by the Original Bill or Bills of Review, they do not charge him with above the Penalty of the said Judgment.

This Court now declared, That the Examination of the time of the actual Entry of the Judgment in this Case, did not impeach the Judgment, but only to guide the Conscience of the Court in the application of the payment of the Mony, and therefore (as this Case is) the whole Mony having been decreed and settled as aforesaid, the Examination of the time of the actual Entry of the said Judgment, tended not to the invalidating thereof, but only to inform the Court, when and how it came to be Recorded, which in Cases of Originals filed, to prevent the Statutes of Limitation, and other Cases of like nature, are usually Examined in the Courts at Law, the Court saw no cause to relieve the Plaintiffs on their Bill of Review, and dismissed their Bill of Review.

Examina-
tion of the
actual entry
of a Judg-
ment at
Law, only
intended to
inform the
Court, and
not to im-
peach the
Judgment.
Examina-
tion of O-
riginals
filed, is to
be in the
Courts at
Law.

Detbick

Dethick contra Banks, 25 Car. 2.
fo. 143.

A Free-man
of *London*
disposeth
an Adven-
ture to his
Son. No
breach of
the Custom,
as to the
Wives third
part.

A Free-man of *London* did assign over an Adventure to the Defendant his Son, against which the Plaintiff complains, and insists, It is contrary to the Custom of *London*, and tends to defeat the Plaintiff his Wife of a full third part of the personal Estate: This Court with the Judges held the disposition to be good, and could not relieve the Plaintiff.

Harmer contra Brooke, 25 Car. 2.
fo. 648.

Bill to per-
form a Mar-
riage Agree-
ment.

THE Bill is to have an Execution of a Marriage Agreement; the Plaintiff *Harmer*, with the encouragement of *Thomas Hamling*, was to marry the Plaintiff *Elizabeth*, the only Daughter and Heir of the said *Thomas Hamling* (the Plaintiff *Harmer* being a man of a great Trade) and in Consideration thereof the said *Thomas Hamling* was to pay the Plaintiff *Harmer* 500 l. at *Christmass* following, and to settle on the Plaintiff and his Heirs a House in *Sussex*, and at his death to give to the Plaintiff *Elizabeth* his Daughter all his Estate real and personal, except 400 l. which he intended to the Defendant his Brothers

Brothers Son, whereupon the Plaintiff *Harmer* married the said *Elizabeth*; but now the said *Thomas Hamling*, the Plaintiffs Father refuses to perform his Agreement and Promise aforesaid, the Plaintiff marrying without his consent and liking, as is pretended, and died without performance thereof, and made a Will, and the Defendant his Executor, which Will the Plaintiff insists was voluntary, and ought in Equity to be set aside, the Plaintiff being disinherited thereby, and to have the said Marriage Agreement performed, is the Plaintiffs Bill.

The Defendant insists, That the said Marriage was had by surprize, and without the Consent of the said *Thomas* the Father, and that he did never approve of it, but when told of it was in great Passion, and said his Daughter was undone, and then made his Will in these words, viz. I give and bequeath unto *Elizabeth* my only Daughter, lately married against my consent and good liking, to *Francis Harmer* the Sum of 20 *l.* over and above the Sum of 500 *l.* which I intend to pay her my self in full for her Portion; and the said *Thomas* the Father being afterwards moved to alter his said Will, declared he would not alter the same, and that he would not be a President to disobedient Children, and the Defendant claims

claims the said Estate real and personal by virtue of the said Will.

This Court ordered it to be Tried at Law, Whether *Thomas* the Father did agree to give the Plaintiff *Francis Harmer* with the said *Elizabeth*, any other or further Estate real or personal at any time, over and besides the said 500 *l*.

And after a Trial at Law, the Marriage Agreement decreed to be made good.

That a Verdict passed for the Plaintiff, That *Thomas* the Father did agree to give the Plaintiff *Francis Harmer*, with the said *Elizabeth*, a further Estate real and personal besides the 500 *l*.

This Court was satisfied there was such a Marriage Agreement, and that the same ought to be made good, and decreed accordingly.

Tregonwell contra Lawrence, 25 Car. 2.
fo. 582.

An Injunction to restrain Ploughing or Burn-beating of Pasture.

THE Bill is, to restrain the Defendant (being Tenant for life) from ploughing up, or converting into Tillage Pasture Ground, to the damage of the Plaintiffs inheritance.

The Defendant insisted, That the said Land was very full of Bushes and Fuz, and that the Ploughing and Burn-beating was an improvement of it.

The Plaintiff insisted, That the Lands are Sheeps-strete or Sheeps-slight, the surface

face or soyl being so thin, that if the same be ploughed up two years together, the Lands will yield no profit in many years after.

This Court on reading an Order 20th Febr. 25 Car. 2. and a Certificate of Referees, doth decree, That a perpetual Injunction be awarded, to restrain the Defendant from Ploughing up or Burnbeating of the said Lands above two years.

Sutton & Uxor ejus contra Jewke, 25 Car. 2. fo. 178.

THat 1500 *l.* was to be put out at Sum left for a Portion.
Interest for the use and benefit of the Plaintiff *Ann*, and then the said 1500 *l.* But if she marry without consent, then a part to be to another.
and the proceed thereof to be paid her at her Age of 21, or Marriage; but if the Plaintiff *Ann* should Marry without the Consent of the Defendant *Jewke* and his Wife, being her Father and Mother, or one of them, or the Survivor of them, then 500 *l.* part of the said 1500 *l.* to be paid to such person as the Defendant *Jewke* his Wife, by Writing under her Hand, and without her Husband should appoint.

That the said Defendant *Jewke* his Wife died in 1668. without making any Appointment, so that the Plaintiff *Ann* is thereupon become intituled to the whole
1500 *l.*

1500 *l.* and the proceed thereof : That the Plaintiff *Ann* married in 1671. and this Suit is to be relieved for the 1500 *l.* and Interest.

The Defendant *Jewke* insists, That *Mary* his Wife died in 70. but before her death in 1669. by Deed Parol directed, that in case the Plaintiff *Ann* married without the Consent of her the said *Mary*, or the Defendant *Jewke* her Husband, then 500 *l.* part of the said 1500 *l.* to be paid to her and the Defendant, or the Survivor of them, and that the said Deed was made upon mature deliberation, to keep the said Plaintiff in due Obedience, and that the Plaintiff *Sutton* having in a clandestine manner married with the Plaintiff *Ann* without the Defendant *Jewke* his privity or consent, and after he had forbidden his Daughter to marry with him on the forfeiture of his Blessing, or what otherwise she might expect from him the said Defendant *Jewke* by means thereof, and by being Administrator to his late Wife, became intituled to 500 *l.* part of the said 1500 *l.*

So the Chief point now controverted is, Whether the Plaintiff *Ann* be intituled to the whole 1500 *l.* or whether she had not forfeited 500 *l.* thereof by her marriage without her Fathers consent and privity, and contrary to his direction and advice.

His

His Lordship was fully satisfied, That 500 l. De-
 the Plaintiffs said Marriage was without creed to be
 the Defendants privity and against his defalked out
 consent, and that therefore the Plaintiff of 1500 l.
Ann cannot have the said 500 l. But de- because of
 creed the Defendant to have the same Marriage
 with Interest from the Plaintiffs Marri- against Con-
 age. sent.

*Wall contra Buckley, 26 Car. 2.
 fo. 178.*

That the Plaintiffs Father, as his Guardian
 Guardian, takes Bond for 100 l. Ar- takes Bond
 rears of Rent due from the Tenants, and in his own
 takes it in his own Name. Name, for
 Arrears of

This Court is of Opinion, That the
 Plaintiffs Father hath by that means made the Guardian
 it his own debt. hath made it
 his own Debt

*Stickland contra Garnet & al, 26 Car.
 2. fo. 340.*

The Bill is for a Legacy of 20 l. gi- Bill for a
 ven to the Plaintiffs late Husband, Legacy.
 by the Will of *George Coker* Deceased, to
 be raised and paid upon the Sale of Custo-
 mary Lands, mentioned in the said Will;
 which said Lands, are by the Will, Devi-
 sed by the said *Coker*, to *Jennet* his Wife
 for her Life, with remainder over to the
 said Defendants in Trust, that after the
 H Death

Death of *Jennet* the said Trustees, should Sell the same, and with the Money thereby Raised, to pay the Legacies in the Will, and the Trustees to be Accountable over for the Surplus to other Persons; and the said *John Stickland* the Legatee Dying before the said *Jennet*, and before the time the said Lands, out of which the said Legacy was to be Raised, were appointed to be Sold.

Legatee
dyes before
the time of
payment of
the Legacy,
yet payable
to his next
of Kin.

The Defendants Crave Judgment of the Court, whether the said Legacy of 20 *l.* was due to the Plaintiff, or Determined by the Death of the said *John Stickland*. This Court was of Opinion, that the 20 *l.* did notwithstanding the Death of the said *John Stickland*, continue payable to the Plaintiff.

Brond contra Gipps. 26 Car.2. fo.763.

Lands De-
creed to be
Sold, to sup-
ply the Per-
sonal Estate.

THis Court declared, that the Plaintiffs Legacies ought to be paid out of the whole Estate of the Testator, viz. out of the Personal Estate, so far as that will extend; and if that will not satisfy the same, then the Testators Mannors and Lands undivided and unsold, shall in the next place come in Aid of the Personal Estate for Satisfaction thereof; and if that be not sufficient, then the whole Mannors, Lands and Tenements, though Sold and Divided, shall

shall notwithstanding such Sale and Division, come in supply thereof in proportion to be Refunded, and paid by the Person or Persons, in whose Hands soever the same shall be found.

*Bowyer & al^o contra Bird, 26 Car. 2.
fo. 769.*

THe Suit is to have an Account of a Legacy of 500 *l.* given by *George Dale*, Father of the Plaintiff *Ann*, to *George* his Son also Deceased, to whom the Plaintiff *Ann* was Administratrix, and to have an Account of the Residuary Estate of *George* the Father, after his Debts and Legacies paid, the Bill Charging, that *George* the Father, made his Will in Writing, and thereof his Son *Thurston Dale*, and one *Dakin* Executors; and upon Publishing of his Will, Declared *Dakin* only to be Executor in Trust for his Children, and to take no Benefit thereby; but the Estate to go to the Children, and Dyed, leaving the Plaintiff *Ann*, and three Sons, viz. the said *Thurston*, *George* and *Robert Dale* all Deceased, and that *Thurston* made the said *Dakins* his Sole Executor, and the Plaintiff *Ann* is the only Surviving Child of the said *George Dale* the Father, and claims the said 500 *l.* and the Residuary Estate.

H 2

This

Estate De-
creed to the
Residuary
Legatee, and
not to the
Administra-
tor.

This Court (it appearing by the said Will, that the said *Thurston*, who was Named Executor without any Trust, was Residuary Legatee of the said *George Dale* his Father, who had given by the said Will, considerable Legacies to every one of his Children) was fully satisfied, the Plaintiffs were not intitled to the said 500 l. nor the Residuary Estate ; but that the said *Thurston* as Residuary Legatee, was well intitled to the Residue of the said Estate, and that the said Trust in *Dakins* ought to be Construed , as is most Consistent with the Will in Writing, and Dismiss the Plaintiffs Bill.

Dom. Leech contra Leech, 26 Car. 2.
fo. 369.

A Deed tho'
Cancelled,
yet good,
and the E-
state shall
not be Di-
vested out of
the Trustees.

THis Court declared, tho' the Deed appeared Cancelled, yet it was a good Deed, and that the Cancelling thereof, did not Devest the Estate of the Trustees therein named, and that the Trust thereby Created, ought to be performed.

Feake

Feake contra Brandsby, 26 Car. 2.
fo. 74.

THat *William Crowe* by Will, Devised Bill for a
to every one of his Servants, living Legacy.
with him at the time of his Death, 10 l.
a piece, and that the Plaintiff was Servant
to the Testator at his Death, so the Plain-
tiffs Suit is for the 10 l. Legacy.

The Defendant insists, that the Plaintiff
was not Servant to the said *Crowe* at his
Death, or lived with him as a Servant; but
the Plaintiff at the Testators Death, and
long before and after, was the Servant of
Mary Brandsby, the Testators Mother.

This Court was Satisfied, that the Plain- Who shall
tiff was a Servant to the Testator, and in- be said to be
trusted in his House-keeping, and employ- a Servant
ed in washing his Linnen, and Tended living with
him in his Sickness; and therefore Decreed the Testator
the Defendant the Executor, to pay the at his De-
Plaintiff her 10 l. Legacy. cease.

Winchcombe contra Winchcomb, 26 Car.
2. fo. 654.

THat in *Michaelmas Term* 2 Car. 1. *John*
Carter obtained a Judgment against
John Winchcomb, the Defendants Grandfa-
ther, of 400 l. upon two several Bonds,
both Dated 17 June 1623. for the payment
H 3 of

of a 100 l. each Bond, one payable the 1st. of May then next, and the other the 1st. of May 1625. That the said *Carter*, made *Humfrey Coles* his Executor, and Dyed, and the said *Humfrey Coles* Dyed, and his Son *John Coles* took Administration *De bonis non* of the said *John Carter*, who produced the Bond payable the 1st. of May, 1625. whole and uncanceled, and thereupon insisted to be a Creditor for the said 400 l. on the said Judgment.

Judgment
upon Bonds
of long
standing or-
dered to be
paid.

But the Defendant *Winchcomb* produced one of the said Bonds Canceled, and insisted, that the same was satisfied, for that *Humfrey Coles* 12 Car. 1. had an Elegit returned, and Lands delivered by the Sheriff, which being near 40 years since the same, would not have slept so long, had not the said Debt been satisfied, one Bond being Canceled. And the said *Coles* insisted, that the said *Carter* was kept out by prior Incumbrances, and that he Exhibited a Bill against *John Winchcomb* the Father, to discover the same, who by Answer, acknowledged the said Debt.

This Court declared, that the said Debt of 400 l. and Costs ought to be paid, and Ordered the same accordingly, and that the same be paid by *Phillip Inuelt* Esq; who purchased the premises liable thereto.

Hodkin contra Blackman & al, 26 Car.
2. fo. 773.

THe Bill is to discover the Estate of the Intestate, *Maurice Blackman*, which came to the Hands of *Elizabeth* his Relict, and to make the same liable to the satisfaction of a Debt of 300 l. lent to the said Intestate, for Security whereof, the said Intestate gave a Penal Security of 1000 l.

The Defendant *Elizabeth* the Administratrix of the said Intestate, insists, she hath no Assets to Satisfie the Plaintiffs Demands, for that in 1665. the Intestate *Blackman*, her late Husband (before Marriage with her) and her Father Doctor *Argoll* came to this Agreement, viz. that her said Father, should give with her in Marriage to the said *Blackman* 500 l. and in consideration thereof, and of such Marriage, the said *Blackman* should enter into one Obligation to the said Doctor *Argoll*, of 3000 l. penalty, Conditioned for the Setting of 1500 l. upon the said Defendant *Elizabeth*, and her Heirs, in Monies, Lands, or otherwise within one Month after the Marriage; that accordingly the said *Blackman* in August 1665. entred into such Bond, and the said Marriage was had, and the said *Blackman* received 300 l. of the Portion, and the remaining 200 l. was in the Hands

Agreement to Settle 100 l. in Money, Goods, or Lands upon Marriage for 500 l. Portion 200 l. of the said 500 l. not paid.
Bond of 3000 l. to perform the said Agreement, and Judgment thereupon pleaded in Bar of other Debts and Goods.

of the Defendants Serjant *Brampton* ; that the said *Blackman* never made such Provision for the said Defendant *Elizabeth*, and her Children, as by the Condition of the said Bond he was to do, and the Defendant *Mary*, after the Death of Doctor *Argoll* her Father, whose Executrix she is, finding the said 3000 *l.* uncanceled, and the Condition thereof not performed, did in *August* before the time of putting the Defendant *Elizabeth's* Answer, commence an Action of Debt against the said Defendant *Elizabeth*, as Administratrix to *Blackman*, her late Husband, and recovered a Judgment thereon, for 3000 *l.* Debt upon the Bond.

But the Plaintiff insists, that the remaining 200 *l.* in Serjant *Brampton's* Hands, which is part of the said *Elizabeth's* Portion, ought to be applied to Satisfie the Plaintiffs Debt. as far as the same will go, and what the same falls short of, the rest of the Estate ought to supply.

This Court declared, they saw no colour of Cause, to give the said Plaintiff any Relief against the said 3000 *l.* Bond and Judgment thereon had, other than against the Penalty, and therefore the said Defendant ought to be first satisfied her said 1500 *l.* out of the Personal Estate of the said *Blackman*, and Decreed the same accordingly.

Mosely

Mosely contra Mosely, 27 Car. 2.
fo. 521.

THe Defendant claims several things Clause in a devised to her *in specie* by the Will Will *that if* of Sir *Edward Mosely*, and the Plaintiff *any Legatee* would bar her claim and right for the *should hinder or oppose* whole by a particular Clause in the Will, *the Execution* viz. That if any Legatee should hinder *tion of the* or oppose the Execution of his Will, then Will, then such person should lose the Legacy be- *such person* queathed. *should lose*

This Court as to the Clause of Forfeiture in the Will, which the Plaintiff would have the benefit of, by reason of the Defendants contesting and opposing of the Execution of it, declared its Opinion to be, That no advantage ought to be taken thereof, but that the Defendant ought to have her *specifick* Legacies, bequeathed by the Will. *the Legacy bequeathed.* A Suit for the Legacy no forfeiture.

The Court also declared their Opinion, of the Rent demanded by the Defendant of 880 £. that notwithstanding the Defendants opposition of the Will, the said Rent was not forfeited or suspended, nor ought in equity to be so deemed, and ordered the Defendants demand thereof to stand good, and be allowed as a good demand.

Plummer

*Plummer contra Stamford, 27 Car. 2.
fo. 74.*

An Ancient
Recogni-
zance not
set aside to
let in a
Mortgage.

That *Edward Stamford* entred into a Recognizance of 800 l. to *John Stamford* his Brother, in 22 Car. the Plaintiff having a Mortgage on *Edward Stamdorfs* Estate, and in respect of the Antiquity of the said Recognizance would have it set aside, presuming the mony to be satisfied, that the Plaintiff may come in with his Mortgage: This Court would not relive the Plaintiff against the Recognizance.

*Twisford contra Warcup, 27 Car. 2.
fo. 749.*

Articles.
Convey-
ance.

The Plaintiff and Defendant entred into Articles for Purchase of the Lands in question, by which Articles the Plaintiff Covenanted, That the said Lands did fully and compleatly contain the quantities of Acres in a particular to the said Articles annexed, and in pursuance of the said Articles and particular a Conveyance was Executed to the Defendant.

Now

Now the Defendant insists, That the Plaintiff hath not performed the Covenant in the said Articles, for that the Lands are short of what the particular mentions them to be; and insists, they ought to be made good by the Plaintiff.

This Court on reading the Articles particular and Conveyance, declared, that altho' the Covenant in the Articles were, that the Lands did full and compleatly contain the quantities in the Schedule, yet in that Schedule, and likewise in the Conveyance, it is mentioned to contain so many Acres by Estimation, and if there were 4 or 5 Acres more, the Plaintiff cannot have them back again; so on the other side if less, the Defendant must take it according to the Conveyance, and that the Articles being only a security for a Conveyance, and the Defendant having afterwards taken a Conveyance, the Defendant shall not resort to the Articles, or to any particular, or to any Averment or Communication after the Conveyances Executed, which ought not to be admitted against the Deed; and therefore, saw no Cause to make any allowance for defect of Acres.

No resort-
ing back to
a defect in
Articles af-
ter a Con-
veyance
thereupon
executed.

*Newton contra Langham, 27 Car. 2.
fo. 563.*

Adventure
in the *East-
India* Com-
pany Mort-
gaged re-
deemable.

THE Plaintiff having an Adventure of 1700 *l.* in the *East-India* Company, Mortgaged the same 15 years since to Sir *William Vincent*, who died and made the Defendant Executor, who hath possessed the said 1700 *l.* Adventure, and refuse to reassign the same to the Plaintiff, the mony being paid for which it was a Security.

The Defendant insists, That the said Adventure is not redeemable, it being contingent and hazardous and cost much mony to insure, and 14 years since it was assigned from Hand to Hand by a Decree, for the Assignment to the Defendants Testatrix.

This Court declared, That notwithstanding the hazard and contingency of the said Adventure Mortgaged, and the length of time since the Mortgage, the Plaintiff ought to be admitted, to a Redemption of the said Adventure.

*Sowton contra Cutler and Clerke, 27 Car. 2.
fo. 676.*

THE Bill is to call the Defendant *Cutler* to an account for Wares delivered him, and Monies paid to and for him amounting

amounting to 3000 *l.* and to be received against an Attachment in the Lord Mayors Court by the Defendant *Clerke*, whereby he Attached 2000 *l.* in the Plaintiffs hands, supposing the Plaintiff to be so much indebted to the Defendant *Cutler*, and that *Cutler* is indebted to *Clerke* in a greater Sum: So the Plaintiff Exhibited an *English* Bill in the Mayors Court for Relief therein, upon which Bill the Plaintiff could not proceed, his Witnesses living out of the Jurisdictions of that Court; so the Plaintiff prays a *Certiorari*, to remove the said Proceedings into this Court.

The Defendant *Clerke* hath pleaded, That by the Custom of the City of *London*, any Creditor in the Name of any other person may make an Attachment of his own Mony in the hands of his Debtor, it not being material whether such Creditor be really indebted to the person so Attaching.

And the said *Clerke* further pleaded, That the said *English* Bill was to the same effect with this Bill, and is not dismissed, and demurred to that part, which prays a *Certiorari* to remove the said Proceedings on the Attachment and *English* Bill, for that it is not practicable to remove Records out of a *Latin* Court to an *English* Court, which cannot hold the Plea there.

of

of, nor for the Plaintiff to remove his own Bill by *Certiorari*.

No *Certiorari* allowed to remove Proceedings by *English* Bill, in the Lord Mayors Court, into *Chancery*.

This Court held the said Plea to be Insufficient, and Over-ruled the same; and the Defendant *Clerke* to answer that part of the Bill: But as to that part of the Bill which requires the *Certiorari*, held the Demurrer to be good, and ordered a *Procedendo* to the Lord Mayor, &c. that they may proceed upon the same Attachment; but at the same time an Injunction to Issue, to stay the Defendants proceedings on the said Attachment in question.

Newport contra Kingston, 27 Car. 2.
fo. 517.

Legacy.

THE Point in difference arising upon the Will of the Lady *Katherine Leveson*, the Question being, Whether 500 *l.* mentioned in her Will be thereby devised to Mrs. *Katherine Newport*, or Mrs. *Snead*, who were both her Grand-daughters, it being thus exprest in the said Will, viz. To my Kinswoman the Lady *Diana Newport*, Wife to my Lord *Newport*, I bequeath my Diamond Pendants which cost 400 *l.* and to her Daughter Mrs. *Katherine Newport* my God-daughter, a Jewel set with Diamonds, wishing her all happiness, and 500 *l.* to my God daughter Mrs. *Katherine Snead*, I give and bequeath a Diamond

Diamond Bodkin and an Emrod Border ;
 I also give her as a Token of my Love
 to her self, a power to alter or add to her
 said Will, and by a Codicil annexed to
 her Will, and made part thereof: And
 after a Legacy given to Mr. *Richard Newport*
 of 400 *l.* in Gold, it follows thus ;
viz. Also I give unto his Sister Mrs. *Katherine Newport*
 my God-daughter 500 *l.* in Silver : And after two other Legacies
 intervening it is thus exprest ; *viz.* Also I
 give unto my God-daughter *Katherine Snead* 100 *l.* more than I have given her
 in my Will ; by which said Will and
 Codicil the said Mrs. *Katherine Newport*
 doth conceive , that there is two 500 *l.* Upon the
 devised unto her, 500 *l.* by her Will, and Constructi-
 500 *l.* in Silver by the Codicil , and the on of the
 Executors scruple to pay the same , for Words of a
 that the said Mrs. *Katherine Snead* doth Will, two
 claim the said 500 *l.* given by the Will to 500 Pounds
 belong unto her, so that Mrs. *Katherine* Legacies to
Newport seeks to have the two 500 *ls.* by one person
 decreed.
 the Will and Codicil.

But Mrs. *Snead* insists , That the 500 *l.*
 given by the Will, as aforesaid , belongs
 to her , and is so intended , and not to
 Mrs. *Newport* , by the most Grammatical
 and reasonable Construction of the Will
 and Codicil.

This

This Court upon Reading of the said Will, was fully satisfied both by Construction of the said Will, and by the Intention of the said Lady *Leveson*, that both the 500 *l.* given by the said Will, and the 500 *l.* given by the Codicil, were given and do belong to the said Mrs. *Newport*, and decreed the said Executors to pay her the 1000 *l.* accordingly.

Wyrall contra Hall, 27 Car. 2.
fo. 516.

A good Will, though no Executor named.

THe Testator made his Will, but named no Executor.

This Court declared the Will to be a good Will.

Price contra Evans, 27 Car. 2.
fo. 460.

Title under an Occupant demurred to and allowed.

THe Plaintiffs Title is under an Occupant: The Defendant demurred.

This Court allowed the Demurrer; for that a Title under an Occupant this Court will not Countenance nor give any Relief thereof.

Lambert

Lambert contra Greene, 27 Car. 2.
fo. 122.

THe Defendant *Cicily Greene* demandeth an Allowance for a Third part of a Tenement and Ground, for the Remainder of a Term of 99 years. The Case is thus; viz. For 80 *l.* the same were Assigned in 1655. to *Henry Hall* for Remainder of a Term of 99 years in Trust, for the Defendants Testator *William Greene*, and the Remainder Expectant, upon the said Term conveyed to the said Testator and his Heirs; which Demand is submitted to the Judgment of this Court.

Lease, not a
customary
Chattel.

This Court declared, That the said Lease was not a Customary Chattel, and would not allow the Defendant's Demands.

Lucking contra Rushworth, 28 Car. 2.
fo. 80r.

THat *John Pincheon* deceased, borrowed of the Plaintiffs Father 4000 *l.* for which he mortgaged Frechold and Copyhold Lands, and also for farther Security entred into a Statute; but the Terms in the Coni-
After a Statute acknowledged, and a Mortgage, the Coni-
sors Trustees renew the Leases in their own Names yet Decreed liable to the Statute.

I

the

the Leases being expired, the Defendants as Trustees have renewed the said Leases with the Colledge in their own Names, in Trust for the Children of *Pincheon*, and so deny the same are liable to the Plaintiffs debt.

This Court was satisfied, the Plaintiffs debt being secured by Statute, as well as by Mortgage ought to be satisfied out of all the Estate of the said *Pincheon* in Law or Equity, and that the Renewals of the said Leases in the Names of the Trustees, ought not to shelter or protect the Estate against the Plaintiffs debt; for that though the Plaintiffs Mortgage did bind but a particular part of the Estate; yet the Statute did bind the whole Estate, and the Statute binding the whole Estate in its own nature, though no mention were made of subjecting the same by the Will to the said debt; nevertheless that debt ought to be made good out of the said *Pincheons* Estate whatever, and decreed accordingly.

Ramsden contra Farmer & al, 28 Car. 2.
fo. 516.

That *Simon Carill* was seised in Fee Lands conveyed the same to Trustees to sell and dispose thereof for performance of his Will, who by his Will devised the said premisses to the said Trustees and their Heirs, to pay his debts, and made *Elizabeth* his Wife his Executrix, who afterwards married Mr. *Barnes*; and the said Trustees, with the consent of the said *Elizabeth*, conveyed the premisses to Sir *John Carill* and others in Trust in the said Will, and the said *Barnes* after died, and the said *Elizabeth* married one *Machell*, and by Deed 22 Car. 1. the said Trustees, *Carill*, &c. with *Elizabeth*, conveyed the said premisses to the said *Machell* and his Heirs; and in 1646. the said *Machell* with the like consent conveyed to *Duncombe*, *Heath* and *Baldwin*, and their Heirs in Trust, that they after the said *Simons* Debts and Legacies paid, should convey to the said *Elizabeth* and her Heirs, or to such as she by Deed or Will appoint: That the said *Elizabeth* raised Monies and paid the said *Simons* Debts and Legacies, and performed the said Will; and after the said *Machell's* death, *Elizabeth* by Will 1650. devised

Lands conveyed to Trustees for payment of Debt.

Trust assigned.

all the said premisses to her Son *John Carill* for life, and after his decease to the first Son of the Body of the said Son lawfully begotten or to be begotten, and to his Heirs. And if her said Son should not have a Son, but one or more Daughters, then she devised the premisses to the first Daughter of the Body of her said Son, and to her Heirs: That the said *John Carill* in the said *Elizabeths* life time had a Son, whose Name was *John*, who died in her life time, and soon after *Elizabeth* died, and her said Son *John Carill* survived her, and never had any other Son after *Elizabeth Machells* death; and the said *John Carill* died, and left the Plaintiff *Lettice* his eldest Daughter, and the Defendant *Elizabeth* his second Daughter, and the Defendant *Margaret* his third Daughter; and the said *Lettice* the Plaintiff claims the premisses as eldest Daughter.

But the Defendants, *Elizabeth* and *Margaret*, insist, They ought to have their equal parts with the Plaintiff *Lettice* in the premisses, and that the said *Simon* had not power to make such Settlement or Will, but say, he was only seised for life of the premisses, and that *Elizabeth Machell* joyned in the Settlement at her Son *John Carill's* Marriage; and if there were such a Will of the said *Elizabeth Machell*, yet the said *John Carill* had a Son named *John*

John Carill, who was Born after the death of the said *Elizabeth Machell*, and lived some time after her death without Issue, and by the words of the Will, the Trust is determined. Constructi-
on of the
words of a
Will.

This Court not being satisfied, as to the Birth and death of the said *John Carill*, directed a Tryal on this Issue, whether *John Carill*, Grandson of *Elizabeth Machell*, dyed during the Life of the said *Elizabeth Machell*, or after her decease.

That upon a Tryal on the said Issue, it was found, that the said *John Carill* the Grandson, outlived the said *Elizabeth*, and therefore the Defendants insist, that the Trust limited by the Will of the said *Elizabeth Machell*, is fully determined. Trusts de-
termined.

This Court declared, they saw no cause to relieve the Plaintiffs Bill in this matter, and so dismiss the Bill accordingly.

Salter contra Shadling, 28 Car. 2.
fo. 66.

That *Bryan* late Lord Bishop of *Win-*
ton being possessor of the Mannor of *Pottern* by Lease from the Bishop of *Salisbury*, (made to Sir *Richard Chaworth*, in Trust for the said late Bishop of *Winton*) by his Will Devised 200 l. per Annum should be paid out of the profits of the said Lease, to *William Salter*, the Plain-

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Constructi-
on upon the
words of a
Will.

tiffs late Husband his Nephew, during his Life; and that the Estate in Law in the said Lease, should continue in Sir *Richard Chaworth*, during his Life, and the Surplusage of the profits, he Devised to the said *William Salter*, to whom he also Devised the Lease after Sir *Richard Chaworths* death, and made Sir *Richard Chaworth* and others Executors, who consented to the said Devise, and about 16 Car. 2. *William Salter* made his Will, and as to his Interest in *Pottern*, he devised the same to Trustees, that they should permit the Plaintiff to receive the profits during her Widdow-hood, on Condition she renewed the Term to 21 years, once in seven years, and if the Plaintiff should Marry or dye, then he declared the profits of the Premises, to go to his two Daughters, *Ann* and *Susanna*, and the Survivor of them and their Heirs, and after their Deaths, without Heirs of their Bodies, then to his right Heirs, and Devised all the rest of his Personal Estate should be to his Executors and Trustees, for the benefit of his said Daughters, and made the Plaintiff and the said Trustees Executors.

That the said two Daughters are since dead intestate, and the Plaintiff being their Administrator, is Intituled to the whole Term and Trust of the said Lease of *Pottern*, as Administrator to her said two

two Daughters, according to the said *William Salters* Will, and the true Exposition thereof, the same being devised in manner as aforesaid.

The defendant *Charles Cleaver* the Infant, being Eldest Son and Heir of Dame *Briana Cleaver* deceased, who was one of the Sisters and Coheirs of the said *William Salter*, and the Defendant *Stradlings* Wife being his Sister and Coheir, insist, that according to *William Salters* Will, and for that no present interest in *Pottern* was Devised to his two Daughters, but only Contingent possibility of Interest, in case the said Plaintiff should Marry or dye, neither of which having since hapned, and the said Daughters being since dead, the Interest and Term in *Pottern* ought to come to them, as Heirs to the said *William Salter*, and not to the Plaintiff, as Administratrix to her two Daughters, the rather, for that they consented to a decree for Sale of Lands, which would have come to them as Heirs at Law, to preserve *Pottern* from Sale, for the payment of *William Salters* debts.

This Court declared, that according to *William Salters* Will, and the disposition therein made of *Pottern*, the whole Interest of the said Term and Trust therein, was well passed in the Plaintiff, and that the Heirs of *Salter*, can have nothing to

do therewith, nor have any Interest therein, and Decreed the Plaintiff to enjoy the same against the Defendants.

Still contra *Lynn & al'*, 28 Car. 2.
fo. 195.

Bill is to be relieved for 123. Acres of Land.

Settlement.

Consideration.

Lease Assigned in Trust for a Joynture, and after for Children.

THAT *Philip Jacobson* Deceased, being possessor of a Capital Messuage or Tenement, and Lands by Lease from the Crown, *Dat. 13 Car. 1.* for the Term of 60 years. Did by Deed in 1639. in consideration of a Marriage with *Elizabeth* his then Wife; and for that she had parted with her Interest in Goods, &c. which by Agreement, she had the Disposition of for her own use, and other Consideration herein mentioned, did Assign over the said Premises and all his Term therein, to *Rumbald, Jacobson, and Abrah. Beard* on Trust, that the said *Eliz.* should have the profits during Life, and after to *James, Paul, Jane* and *Mary*, her Children, or such of them as the said *Elizabeth* should appoint by her Will, and for want of such Appointment to the said *James, Paul, Jane* and *Mary*, or so many of them as should be living at her decease, share and share alike; and after *Elizabeth* dyed, *Paul* the Son being dead

dead in her Lifetime. Afterwards by deed in 1643. in consideration of a Marriage between the said *Philip Jacobson*, and *Frances Earnely*, and for a Joynture for the said *Frances*, and for Provision for such Children, as he should have by her, the said *Philip Jacobson*, and *James* his Son, Assigned over the said Premisses, for the remainder of the said Term of 60 years, and all his Goods and Household stuff unto *William*, *Daniel*, and *Alexander Staples*, their Executors, &c. on Trust, to permit the said *Frances* and *Philip*, and such Children as they should have between them, to receive the profits during the said Term and after the decease of him and his said Wife without Issue, then on Trust, as to part to suffer the Executors of the said *Frances*, and as to the residue, the said *James Jacobson* his Executors, &c. to receive the profits during the Term afterwards by deed in 1646. Reciting all Assignments and Indentures aforesaid, he the said *Philip Jacobson* Assigned over the said Premisses, and his Term therein, to *Alexander Staples*, and *Jeffery Daniel* their Executors, &c. on Trust, as to the said *Frances Jacobson*, for the Premisses limited to her by her first Joynture; and as to several other parcels of Land named, as in the said Deed is recited, which said last premisses, contain 132 Acres, which are in Trust for

Release of
Trusts.

for the said *James Jacobson*, from the death of his Father, during the residue of the Term; and in case the said *James* should remain unmarried, or being Married, and should dye without Issue, and his Wife being a Widow, then the Rents and Profits thereof to remain, and be to his younger Brother and Sister, and afterwards *James* and *Thomas Earneley*, Son in Law of the said *Philip*, having Married *Jane*, one of the Daughters of the said *Philip*, did 22 Car. 1. Release to *Staples* and *Daniel*, and to the said *Phillip*, and *Joanna Jacobson*, *vid.* Executrix of *Rombold Jacobson*, who Survived *Beard*, all and all manner of Trusts and demands whatsoever, and Suits in Law or Equity, which they or either of them, their Executors, &c. had from the beginning of the World unto the date thereof, in all the Lands and Tenements, with the Appurtenances then, or theretofore in the tenure of *Philip Jacobson* aforesaid, in the County of *Wilts*, and by another Release in Jan. 1647. the said *James* and *Thomas Earneley*, Released unto the said *Philip Jacobson*, and *Joanna Jacobson*, all manner of Trusts and demands whatsoever, in all Lands in the County of *Wilts*, as in the former Release, and afterwards by deed in 1653. reciting, that there was a Marriage then shortly to be had, between the said *James Jacobson*,
Son

Son and Heir of *Philip Jacobson*, and one *Margaret Still*, the said *Philip* did Assign over unto *John Still*, and *Nicholas Still*, their Executor, &c. the said 123 Acres, for the Residue of the Term, to the use of *James* and *Margaret*, for their Lives; and after their Deceases, to the right Heirs of the said *James*, begotten of *Margaret*, and if *Margaret* should Survive *James*, and have no Child by him, and he dye before the end of the Term, then she should have power to sell 51 Acres of the premisses, and the Residue to the Executors of *Philip*; and if *Margaret* dye in the lifetime of *James* not having any Issue of her Body by him begotten then living, then to the use of the said *James Jacobson*, his Executors, Administrators and Assigns, for the residue of the Term, which Marriage took effect; and *Margaret* dyed without Issue in the Lifetime of *James*, after whose Decease, the said *James* being in possession by Deed, in 1661. for 400 l. Mortgaged the 123 Acres to *Elizabeth Brinley*, and yet enjoyed the 123 Acres, till he dyed, and the said *Elizabeth* Assigned over the said Mortgage, which now by mean Assignments, is come to the Plaintiff, and *James* is dead without Issue or Brother, and the Defendants *Zenobia*, *Frances* and *Rachell*, do him Survive.

This Court was fully satisfied, that the deed

Voluntary conveyance.

Remainder after a Limitation of a Term, to an Issue Male void in Law.

Deed in 1653. by which the said *James* derived his Title, and afterwards made the said Mortgage, under which the Plaintiff claims, was a good Conveyance, and well executed in *James*, and that the Conveyance in 1646. was a voluntary Conveyance, and the Estate thereby claimed by the Defendants created, being an Estate in remainder, after a Limitation of a Term for years, to an issue in Tail, was void in Law, and Decreed the Plaintiff to the possession of the 123 Acres, or the Money due on the Mortgage, and to enjoy against all the Defendants, and Decreed that the Plaintiff and Defendant *Hopkins*, who is Administrator of the Mortgager *James Jacobson*, to come to an account.

Oliver contra Leman & al', 29 Car:2.
fo. 102.

A Tryal at Law directed to be within a precise time.

A Trial at Law, is directed to the Plaintiff to try his Right to a Reversion of Lands, after the Death of the Defendant *Wainwright*, so the Plaintiffs desire what time they think fit to try the same; but the Defendant insists, that the Plaintiff ought to be confined to a convenient time, which was prayed might be the Rule in this Case, and that the Defendant might not be kept in suspense, and to wait on the Plaintiffs Convenience, when he shall think fit to try the same

same. This Court ordered it to be Tryed in *Easter* Term next, or the Issue be taken, *pro confesso*.

Stawell contra Austin, 29 Car. 2.
fo. 579.

THat *George Stawell* Father of *Ursula* Construction and *Elizabeth Stawell* being seized of a Will in Fee of Lands, by Deed and Recovery thereon, settled all the said Lands on the Defendant Sir *John* and *Robert Austin* and their Heirs, to the said *George* for Life; remainder for such Estates and Charges, as he by Will or other writing should appoint, remainder to the Heirs Males of his Body, with remainders over, and by Will persueant to the power reserved by the said Deed, devised the premisses settled by the said Deed to the said Defendant for 99 years after his death, upon Trust, in Case he left no Son, or such as should die before 21 without Heirs, Males, and should leave one or more Daughters, for raising of 12000 *l.* if but one Daughter, for such Daughter, and if two or more Daughters, then 20000 *l.* to be raised for their portions, to be equally divided between them, and to be due and payable at their respective Ages of 21 years, or days of Marriage, and the said *George* died leaving no Son, and having only three Daughters, viz. *Ursula*,
Eli:

Elizabeth, and one *Ann Stawell*, who died since her Father, and that the said Testator *George* his Relict married the Defendant *Seymore*, and she on the death of her Daughter *Ann*, took the Administration of her Estate, and also soon after died, leaving the portion of the said *Ann* in the said 20000 *l.* Unadministrated, and Administration of the said *Anns* Estate was granted to the said *Ursula*, and *Elizabeth* her Sister, who are intituled to the said *Anns* personal Estate, and that the said 20000 *l.* ought to be raised by the said Trustees, out of the Lands settled as aforesaid ; but the Defendants the Trustees insist, That by the words of the Will it is dubious, whether the whole 20000 *l.* ought to be raised, or any more than 12000 *l.* the said *Ann* being dead unmarried, and before 21. And the Defendant the Heir insisted, That as the Case is, the portions of the said *Ann*, ought not to be charged on the said Lands, so the only Question before the Court being, whether the Trustees shall raise 12000 *l.* or 20000 *l.* for the said Plaintiffs *Ursula* and *Elizabeth*.

When Land
to be charged
with portion,
or not, is,
upon the
words of
the Will.

It appearing plainly to this Court, that by the words of the said Will, that if the said Testator *George* had two Daughters, or more Daughter, then 20000 *l.* should be raised.

This

This Court is of Opinion, and declared, that the Lands ought to be charged with the 20000 *l.* and the payment thereof to the Plaintiffs *Ursula* and *Elizabeth*.

Lawrence contra Berny, 29 Car. 2.
fo. 156.

THis Case is on a Bill of Review: This Bill of Review Court declared, they would not view. make Error by construction; and where a Decree is capable of being executed, by the ordinary Process and Forms of the Court, and where things come to be in such a State and Condition after a Decree made, that it requires an original Bill, and a second Decree upon that, before the first Decree can be executed; In the first Case, whatever the inniquity of the first Decree may be; yet, till it be reversed, the Court is bound to assist it with the utmost process the course of the Court will bear, for in all this, the Conscience of the present Judge is not concerned, because it is not his Act, but rather his sufferance, that the Act of his Predecessor should have its due effect by ordinary Forms: But where the common Process of the Court will not serve, but a new Bill and a new Decree is become necessary to have the Execution of a former

Where no ordinary Process upon the first Decree will serve, but there must be a new Bill, to pray Execution of the first Decree by a second Decree.

mer Decree, is in its self unjust ; there this Court desired to be excused, in making in its own Act, to build upon such ill Foundations, and charging his own Conscience with promoting an apparent injustice ; and to this condition hath the Plaintiff *Lawrence* brought himself, for he forbore to apply himself to this Court to support him, as one that claimed under the Decree in 1650, or to pray an Injunction, to stop *Berney's* proceeding at Law, but stay'd till *Berney* had recovered the Land by a Tryal at Bar, and been put into Possession by the Sheriff ; and now no ordinary Process upon the first Decree will serve, but he is drawn to a new Bill, to pray Execution of the first Decree, by a second Decree, and this obligeth the Court to examine the grounds of the first Decree, before they make the same Decree again. And this Court was not of this Opinion alone, but it was also the Opinion of others that were before him, who had made several Presidents in like Cases, and would not enter further into Arguments of the Errors.

Lawrences Bill was an original Bill, to Execute two Decrees in 1650, and 1651, and the Defendant *Berney* now also Plaintiff, it being cross Causes brought his Bill of Review, to Reverse the said Decree, &c. as Unjust and Erroneous, That
the

the first Decree by the Lord *Coventry*, in 30 *Car.* 1. decreed a Sale of the premisses for a performance of the Trust; that in 1650 a Decree was made to frustrate the Lord *Coventry*'s Decree.

Priske contra Palmer, 29 *Car.* 2.
fo. 323.

THIS Court was satisfied the Plaintiff ^{Want of a} had a quiet enjoyment for a long ^{surrender} time, and declared, That notwithstanding ^{Aided.} a Surrender is wanting, yet the Plaintiffs Title ought to be supplied in Equity, and decreed the Plaintiff to enjoy the premisses, and the perpetual Injunction to stay all proceedings at Law.

Woolstenholm contra Swetnam, 29 *Car.* 2.
fo. 146.

THAT *Thomas Swetnam* deceased, being ^{Settlement.} possessed of a Personal Estate, and making provision for his Grand-Children, being the Children of *Thomas* his eldest Son, being five in number, whereof *Peter Swetnam* was one, did by Deed authorize the Defendant *William Swetnam*, who was his second Son, and the Defendant *Thomas Swetnam*, who was his Grandchild, to receive 32 *l.* Rent, which was an Arrear of 16 *l. per Annum* Annuity of *Foster's Farm*,
K in

in Trust, to be divided amongst his said five Grandchildren at the Age of 21; and the said *Thomas* the Grandfather by some other Deed charged his whole Lands on a Settlement thereof on the Defendant *Thomas*, with the payment of 1000 l. equally amongst his said five Grandchildren, whereof the said *Peter* was one, and in further kindness to the said *Peter*, in 1657. by Will gave him 100 l. to be paid out of the Personal Estate, and made the Defendant *William* his Executor; and the said *Peters* Father, to increase his Fortune, put out several Sums of Mony in the said *William's* Name, and deposited other Mony in the said Defendants hands, for the said *Peters* use, and by his Will further gave to *Peter* 30 l. and *Peter* married the Plaintiff *Martha*, and by his Will devised all his Estate to the said *Martha*, whereby the Plaintiff is intituled to the said Devisee, and to the said *Peters* share in the 1000 l. so to be relieved for the Sum, is the Bill.

1000 l. to
be raised and
divided a-

The Defendant *William* insists, That *Thomas*, the Father of *Peter*, died possessed of a Personal Estate of 266 l. and the Defendant as his Executor possess it, and paid his debts, being 100 l. and says, that the 1000 l. was given to be divided amongst five Children, one dies before distribution the Survivors shall have his share, and not the Devisee of him that is dead.

afore:

afore said, - and as the Defendant *William* should think fit, and that *Peter* dying before any distribution was made to him thereof, the Defendant *William* ought not to distribute the same amongst the other four, and no part of it ought to come to the Plaintiff.

This Court declared, That no part of the 1000 *l.* doth belong to the Plaintiff in Right of the said *Peter*, or otherwise, and dismiss the Bill.

Nance contra Coke, 29 Car. 2.
fo. 64.

THe Plaintiff seeks Redemption of a Mortgage made the 17th of Jac. 1. the Defendant pleaded a Release of the Mortgagors Interest in Anno 1620.

Release pleaded against the Redemption of a Mortgage, and allowed.

This Court after so long time and such Release, could not admit the Plaintiff to Redeem, though the premisses were Mortgaged for 376 *l.* and worth now to be sold 1500 *l.*

Burgrave contra Whitwick & al, 29 Car. 2.
fo. 173.

That George *Whitwick* deceased, having Issue *George* his only Son, and *Elizabeth*, and *Martha* the Wife of the Defendant *Curtis*, by Will bequeathed to

Will.

the said *Elizabeth* 600 *l.* to be paid unto her as therein after is expressed, and to the said *Martha* 600 *l.* in like manner, and gave the residue of his Personal Estate to the said *George* his Son, to be employed as should be afterwards expressed in his Will, and also gave to his said Son and his Heirs all Lands whatsoever, and Willed, That if either of his said Children should dye in their Minority, that the surviving should be Heirs to the deceased in equal portions; but if all should die without Issue, then he gave his Lands to *George* the Son of *Humfrey Whitwick*, with Remainders over, and ordered the said Portions in convenient time to be laid out in Lands for his said Children, and till Lands purchased the Executors to retain the Money so long as the Overseers should see good, at 5 *l. per Cent.* and made the Defendant *Humfrey Whitwick* Executor.

That *George* the Son died Intestate under Age unmarried, that no Land hath been purchased by the Executor: That *Martha* attained 21. and received her Portion, and also the Moiety of the residue of the Personal Estate bequeathed to *George* the Son, but refuses to pay *Elizabeth* her 600 *l.* and Moiety of the said residue of the Personal Estate, she being yet a Minor under 21. yet she is married to the other Plaintiff *Burgrave*, who can give a Discharge.

The

The Defendant insists, According to the meaning of the Will he ought not to pay *Elizabeth* till the Age of 21 years, for in case she die before, the said *Martha* ought to have the other Moiety of the residue of the Personal Estate, and he is advised there is a possibility of Survivorship of the Plaintiff *Elizabeths* Portion, and Moiety of the residuary of the Personal Estate, and that if he should pay it to the said *Elizabeth*, and she should die before 21, the Defendant *Martha* may compel him to pay it again.

But the Plaintiff insists, That the Moiety of the residuary Personal Estate devised to the said *George* not being laid out in Lands, falls to the Plaintiff within the words of that Clause in the Will, that gives the residue by equal portions to the surviving, and so no further Survivorship intended.

This Court was of Opinion, and declared the residuary part of the Personal Estate is not subject to any contingency of Survivorship, but that the Interest of that presently vested in the Plaintiff, upon the death of the said *George* the Son, and ordered the Defendant, the Executor, to pay one Moiety of the residuary Personal Estate; and in case *Elizabeth* die before 21, then the 600 *l.* to be paid to *Martha*, which in the mean time is to be kept in the Defendants hands.

Residuary part of the Personal Estate not subject to any contingency of Survivorship, but the Interest presently vested.

*Morgan contra Scudamore, 29 Car. 2.
fo. 658.*

Renewing
Copies upon
reasonable
Fines.

THE Plaintiffs being Customary Tenants of the Mannor, in which Mannor the Tenants hold Estates, by Copy to them and their Heirs, by the words (*Sibi & Suis*) for 99 years yielding a Rent, paying a Herriot, and doing of Suit and Service, &c. And by the Custom of the said Mannor, the Lords upon Expiration of every Estate, ought to renew upon reasonable Fines, and which said Estates, by the Custom of the Mannour, do descend from Heir to Heir, and their Estates to be renewed for reasonable Fines, they being expired, which the Lords of the Mannor refuse, demanding more than the Fee for a Fine, whereas two years value, was as much as ever was, or ought to be given or demanded.

The Defendant, the Lord of the said Mannor insists, that there was such a Custom to renew for 99 years, but the Fines always at the will of the Lord, and such as the Plaintiffs could agree with him, for there being no benefit to come to the Lord during the 99 years, so the question is, whether the Lord shall be at liberty, to set what Fine he please, or be restrained therein by this Court, it appearing, that the Fines are Arbitrary.

The

The Plaintiffs insist, that though the Fines are Arbitrary, yet the same are by Law supposed to be reasonable, and that in some Cases; the Law had adjudged above two years value, to be an unreasonable Fine, and the Defendant had demanded 10 and 12 years value for a Fine, which is very extravagant, and the will of the Lord in this Case ought to be limited.

The Defendant insists, that the Plaintiffs Estates, and Terms for 99 years, expired many years before the Bill Exhibited, some of them 30, and others 11 or 12 years since, in the life-time of the Defendants Father, and some of the Plaintiffs Estates have been granted to others, and Fines levied thereon, and that the Tenants of the said Mannor, do not during the 99 years pay any Fines upon death or alteration, so nothing is due to the Lord for 99 years together, so that the Defendant insists nine or ten years purchase is a reasonable Custom.

This Court declared, the will of the Lord ought to be limited, and that the Plaintiffs onpayment of two years value, shall be admitted to their said Estates, and hold the same against the Defendant, and all claiming under him, and that the Plaintiffs shall renew such Estates within one year after the Expiration of their Term,

The Lord of a Mannor limited to two years value, for a Fine.

Tenants De- in case they be of Age, or within the four
cree to re- Seas at such time, or otherwise within one
new within year after such respective Tenant shall at-
one year af- tain the Age of 21, or return from beyond
ter the Lea- the Seas, or else such Tenant shall be for
ses expired, ever foreclosed of any help or benefit, and
 and then the Lord is at liberty to dispose
 thereof.

*Warwick contra Cutler, 30 Car. 2.
 fo. 285.*

Will.
Lands devi-
sed to be held
by Execu-
tors, till his
Son attain
22 years,
Son dyes be-
fore 22 Ex-
ecutors de-
creed to hold
the Lands till
the said 22
years.

THE Testator deviseeth Lands to be
 held by his Executors, till the Te-
 stators Son attained 22 years of Age, for
 maintenance of the Executrix, and her
 Children, that the said Testators Son dyed
 before 22 years of Age.

This Court decreed the Executrix to
 hold the Lands against the next Heir, un-
 til the said Sons Age of 22 years, as if
 the said Son had lived to 22 years, and
 the Plaintiffs debt on Bond, to be paid by
 the next Heir, or the reversion to lye li-
 able, and charged therewith.

Jolly

Jolly contra Wills, 30 Car. 2. fo. 523.

THat *Roger Garland*, Elder Brother, Will. by Will, did give unto *John Wills*, Devise of Goods to *J.* the Defendants late Husband, the use of S. for 11 years, the remainder over *J.S.* all and singular the Goods, Plate, &c. years, the remainder over *J.S.* whatsoever then in his House, for Term of 11 years from his death, and after the 11 years expired, he gave the same to his two Nephews, *Robert* and *Roger Garland*, and to his Niece *Elizabeth* the Plaintiff, to be equally divided amongst them, and after the 11 years, the said *Wills* was to deliver them to the Plaintiff. decreed to deliver the Goods after the 11 years.

The Defendant *Wills* insists, that by the bequest of the said Goods for the 11 years, she and her Husband to whom she is Executrix, are well intituled to the property of them, and that the Deviseur is void in Law and Equity.

This Court decreed the Defendants Will, to deliver the goods to the Plaintiffs, to be divided according to the Will, the said 11 years being expired.

German contra Dom Colston, 30 Car. 2. fo. 741.

THIS Court decreed, that in case here, Legatees to refund to make up Assets. after any Debt of Sir *Joseph Colston*, should be discovered and recovered against his Executors the Legatees of Sir *Joseph Colston* are to refund in proportion, what they

they have received for, or towards their Legacies, to make up Assets for satisfaction thereof.

Cotton contra Cotton, 30 Car. 2.
fo. 71. & 282.

Devise.

THAT *Nicholas Cotton* being seized in Fee of Copyhold, and Free hold Lands in *Middlesex* and *Surry*, of 500 *l. per Annum*, in 1676. dyed without Issue, whereby the same descended to the Plaintiff, as Couzen and Heir to the said *Nicholas*, but the Defendant *Katherine Cotton*, pretends that the said *Nicholas Cotton* made his Will in Writing, 25 years since, viz. in 1650. having first surrendred the said Copyhold Land to the use of his Will, and bequeathed the same to the said Defendant, Mrs. *Katherine Cotton* his Relict, and her Heirs; but if such Will were, the said *Nicholas* purchased some Lands since, which descended to the Plaintiff, and that the said *Nicholas* a little before his death, contracted with Sir *Thomas Lee* and his Trustees, for certain Copyhold, and other Lands in *Sunbury*, and was to pay 1110 for the same, and paid most of the Mony in his Life-time, and had possession.

The Defendant Mrs. *Cotton* insists, that *Nicholas Cotton* her late Husband, deposited in the Hands of the said Sir *Thomas Lee*, or his Trustees 600 *l.* designing to pur-

purchase the said Land in *Sunbury*; but her said Husband *Cotton*, was to have interest for the said Mony, and he only rented the said *Sunbury* Lands, and not purchased them, because a good Title could not appear, but insist, that after the death of her Husband, she purchased the premisses, and paid 320 *l* more then the 600 *l*. paid into the said Sir *Thomas Lee's* Hands, and that her Husband by the said Will, devised to her all his Real and Personal Estate, and made her Executrix.

This Cause being now heard by Mr. Articles for a Justice *Windham*, who on reading the Articles between the said *Nicholas Cotton*, and the said Sir *Thomas Lee*, whereby the said *Nicholas* Contracted with him for the purchase of his Free and Copyhold Lands in *Sunbury*, in Fee simple for 920 *l*. is of Opinion, that the said *Nicholas* dyed before any Conveyance made by the said Sir *Thomas Lee* of the said premisses to the said *Nicholas*, and the said Sir *Thomas* paying Interest for the said 600 *l*. and the said *Nicholas* paying Rent for the said premises, the said 600 *l*. at the death of the said *Nicholas*, was part of his personal Estate, and as to that 600 *l*. could not relieve the Plaintiff, but dismiss the Bill.

And as to the Mortgage made to *Perkins* by the said *Nicholas*, and the Defendant his Relict, it appearing that part of the Mor-

Articles for a purchase, and 600 *l*. paid (but interest was paid for it till the Conveyance executed) contractor dyes before any conveyance, the 600 *l*. was part of his personal Estate.

Equity of redemption to whom belongeth.

Morgaged Lands was before that Mortgage made, settled on the said *Nicholas*, and *Katherine* in Joynture, or otherwise, so as the same came to her as Survivor, this Court is of Opinion, that the Equity of Redemption, belongs to her as survivor, and not to the Plaintiff.

Republication of a Will.

But as for the other part of the Mortgaged premisses, and other matters in the Plaintiffs Bill, for which he seeks relief as Heir. The question being, whether any republication were of the said *Nicholas* his Will, and whether the same Lands do belong to the Plaintiff as Heir, or to the Defendant *Katherine* as Devisee by force of the said Will.

This Court referred that point to a Tryal at Law upon this Issue, whether the said *Nicholas Cotton*, did by his said Will, devise the said Lands in *Shepperton* in the Defendants answer mentioned to be purchased by the said *Nicholas Cotton* of one *Roswell* in Fee in 1659. to the said *Katherine*, or not.

Lands decreed to the Devisee.

A Tryal at Law having been had upon the point aforesaid, a Special Verdict was by the Lord Chief Justice *North*'s direction found, and on a Solemn Argument before all the Judges of the *Common Pleas*, they unanimously gave Judgment for the Defendant, that the Lands in question, did belong

belong to the Defendant *Katherine*, as Devisee by the said Will.

This Court confirmed the Judges Opinion.

Civil contra Rich, 30 Car. 2. fo. 338.

THat Sir *Edwin Rich* made his Will, whereby he after some Legacies gives and Bequeaths all the residue of his Estate both real and personal, to Sir *Charles Rich* his Heirs and Assigns for ever, and makes him Executor of his Will, and in his Will says, he left his Estate as aforesaid, in Trust with him, wherewith to reward his Children and Grand-children according to their demerit.

This Court declared, That as to Sir *Edwins* Estate taking the words of the Will of the said Sir *Edwin* as they were, they could amount to no more than a general Trust in Sir *Charles*, to reward such of his Children, and Grand-children as they should demerit, and as Sir *Charles* should think fit, and not an absolute fixed right.
 A general Trust in a Will for Children, and not a fixed Trust to create a certainty of right.
 ed Trust, to create a certainty of right or interest as to any certain Proportion, in any of the Children or Grand-children, much less in the Plaintiff *Civil Rich*, who demands the greatest part of the Estate, and that it was in the Grandfathers power, to give the said Estate, or what Proportions thereof

thereof as he pleased, to any of his Children or Grand-children, but whatever of the real Estate of Sir *Edwin* was disposed, or settled by the said Sir *Charles* by act Executed in his Life time, or was devised, or given by the Will of the said Sir *Charles*, the Plaintiff not to be releived, but dismiss the Bill.

*Boeve contra Skipwith, 30 Car. 2.
fo. 140.*

A Supplemental Bill,
for a further
discovery.

THE Bill is a Supplemental Bill, to have a further discovery from the Defendant by way of Evidence, for the better clearing the Matters depending on the Account, which the Defendant hath not answered in the former Cause.

The Plaintiff pleaded the former Bill, to which the Defendant answered, and the Cause heard, and the Account directed.

This Court ordered the Defendant to answer to all Matters in this Bill, not answered to in the former Cause, but the Plaintiff not to reply, nor to proceed further.

Dom.

Dom. Grey & al' contra Colvile, & al'
30 Car. 2. fo. 397.

THe Plaintiff the Lady Greys Bill is to be relieved for a debt of 1500 l. and Interest on Bond, wherein *John Colvile* did bind himself and his Heirs, to repay the same unto the Plaintiff her Executors and Assigns, that the same might be paid out of the Lands, which were purchased by the said *John Colvile* with his own proper Mony, in the names of himself and the Defendants Wife, to hold to them two for their lives, and then to the Heirs of *Colvile*, and the rest were purchased in the names of the said Defendants *Morris* and *Saunders* in Trust for the said *John Colvile* and his Heirs; That soon after and before the 1500 l. was paid, the said *John Colvile* died, and the right and equity of the premises, during the life of the said Defendants Wife is in *Josia Colvile*, and the Reversion in Fee after the death of the said Wife, will descend to the said Defendant *Josia Colvile*, as Son and Heir of the said *John Colvile*, and the profits are received by him or for his use; that the said *John Colvile* dying intestate, Administration is granted to *Dorothy* his Relict, who pleads she hath no personal Estate, whereupon

Lands purchased in Trust decreed Affets to to pay Judgment.

whereupon the Lady Grey commenced a Sute at Law, by filing an Original for her said debt against the Defendant *Josia* as Son and Heir of the said *John Colvile*, and hath got Judgment thereon to have satisfaction for the said debt, out of the Reversion of the Lands of *John*, which descended in Fee to the said Defendant *Josia Colvile*, and ought to have satisfaction accordingly, but the said Defendant *Josia* pretendeth he hath nothing by descent in present, but the Reversion of the Lands purchased in the names of *John Colvile* and his Wife, after the death of his Wife, whereas he and the other two Defendants were only Trustees for *John Colvile* and his Heirs, and their Trust being now come to the Defendant *Josia*, they are liable as Assets in equity for satisfaction of the Plaintiffs debts, and the Plaintiff ought to be let into the immediate Possession, and the said *Josia* also insists, That the premisses are incumbered by a former Judgment of one Lease for 800 *l.* and the Plaintiffs Creditors, and other the Creditors in their Suit, seeking relief against the same Defendants, upon the same Trust and Equity, and to have their debts paid out of the said Lands, they insisting they are Creditors by Judgment, grounded on Original of the same day and date with the said Lady Grey, and
ought

ought to be satisfied in equal degree and time.

The Plaintiffs *Creed* and the other Creditors insist, That they for so much as the Estate in Law of *Wife* is in the Heir, that their Judgments ought to Attach the Lands according to priority of Originals, and tho' the said *Lake* have obtained a Decree, prior to the Creditors in these Suits, yet the same is to be subject to the direction of this Court, and ought not to take place, but according to the Date of their Originals.

This Court (it being admitted by all that the Original on which the said *Lakes* Judgment is grounded, is prior to all the other Creditors Originals, and that the Plaintiff the Lady *Grey*, and *Creeds* Originals are next in priority, and bear the same date one with another, and ought next to be satisfied with other Judgments, who Originally bear the same date) declared, that the Estate purchased in the Names of the Defendants *Wife* as aforesaid, was a Trust for life, attending the Reversion, and so liable to make the several Plaintiffs Satisfaction for their Debts, and should be enjoyed by the Plaintiffs, against the said *Wife* and *Josiah Colville* the Heir, and the Court decreed, that if the Estate of *Wife* as aforesaid were not sufficient, then the said Reversionary Lands, purchased in the

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Names

Names of the said *Morris* and *Sanders*, after the death of Sir *John Tufton*, who hath an Estate for life in the said Lands, should go towards Satisfaction of the said Debts.

Carr contra Bedford, 30 Car. 2.
fo. 64.

Will.

THe Bill being, that *Edmund Arnold* having no Child, by his Will, whereof, he made the Defendant *Bedford* Executor, gave several Legacies to several persons and uses, and gave all the rest and residue of his Moneys and Personal Estate after Debts paid, to and amongst his Kindred, according to their most need, to be distributed amongst them by his Executors, saving such Legacies as should by his Will, or any *Codicil* further dispose of, and the Testator afterwards by *Codicil* gave other Legacies, and desired that a care and regard should be had to the Plaintiff, *John Buncher*.

The Defendant the Executor insists, that he not knowing to what degree of Kindred the bequest of the said residue ought to extend, he had annexed two Schedules of Remoest Kindred, and is advised until their several Claims, were examined and settled by this Court, he could not safely make a distribution.

This

This Court taking into consideration, to what degree of Kindred the Testator's bequest of the residue of his Personal Estate to his Kindred of most need could extend, that the Act of Parliament for better settling Intestates Estates, was the best Rule that could be observed, as to the Limiting the extent of the word Kindred, and that it should extend only to the Testators Sister, *Ann Carr*, and her Children, and to the Testators Nephews and Nieces now living, and that no Kindred out of the degree of a Brother or Sister to the Testator, or a Child of such Brother or Sister, ought to come in or have any share of the said Residue, and that amongst those that are to come into the Distribution, the Executor ought chiefly to consider those that have most need, that so they that have more need, may have more than they that have less, and decreed the same accordingly: and as to the said *John Buncher*, who was his Sisters Son, and so to have share, and was particularly recommended to the Executor, who the Court declared had a power to give some more than other, this Court ordered the Executor to give him somewhat considerably out of the Residue of the said Estate, and the Executor to distribute the remainder to such of the Kindred, as are to come into the Distribution, as shall appear to the

Devise after Debts and Legacies paid, the Residue (amongst his Kindred, according to their most need) this to be extended according to the Act for better Settlement of Intestates Estates.

Distribution. said Executor to have most need, and in such manner and proportion, as he shall think fit, and Sir *Samuel Clark*, one of the Masters of this Court, is to see right done in this Case, and the Bill wherein the Plaintiffs which are beyond the degrees of Nephews of the said Testator, is to stand dismissed.

Bourne contra Tynt, 30 Car. 2.
fo. 636.

Will.

THe Case is, that *Roger Brown* the Plaintiffs Brother, by his Will in 1671. devised to Executors in Trust, all Lands as before that time were Mortgaged to him, and all Money due thereupon, that they should lay out so much of his Personal Estate, as remained after Debts and Legacies paid in a purchase of Lands of Inheritance, to be settled on the first Son of his Body, and the Heirs Males of the Body of such first Son, and so to all Sons in Tail Male, and for want of such Issue on the Plaintiff for life, remainder to the Plaintiffs eldest Son in Tail, remainders over to the Plaintiffs Children in Tail, and by his Will declared and devised, that in case the Child his said Wife was then big withal, should be a Daughter, then he gave to her 1000 l. to be paid to her at 21 or 6 Months after Marriage, and in case, she
Mar-

Married with consent of the Trustees; then the said Portion to be 3000 *l.* and it was provided by the said Will, that the Trustees out of the Interest of the said 3000 *l.* should pay for the Maintenance of the said Child, 80 *l. per Annum*, and it was also provided, that in case such Daughter should dye before such Marriage or Age of 21 then her Portion and Mony so devised to her, should go, and be for the use and benefit of such Person or Persons as should at any time enjoy his Lands of Inheritance according to the Will; and thereby declared the same Money to be laid out in a Purchase of Lands, to be settled as aforesaid, and also declared, that the rest of the Personal Estate not given or disposed of by his Will, should all be bestowed in Lands of Inheritance, and settled as aforesaid; and the said *Roger Burne*, dyed without Issue Male of his Body and about three Months after the said Defendant *Florence* his only Daughter was Born, and the Trustees have not pursuant to the Will, laid out the Personal Estate in Lands, so that the Plaintiff ought to have the Interest of such Money, as should have been laid out in Lands.

The question in this case being, whether the 3000 *l.* and the Interest thereof over and above the 80 *l. per Annum* Maintenance of the Defendant *Florence*, should

be paid to the Defendant, or to the Plaintiff, who claims the same by virtue of the Will, in case the said Defendant *Florence* had not happened to be Born, the Will being made before she was Born, and the Plaintiff claiming the 3000 *l.* and Interest over and above the said 80 *l. per Annum*, in Case she should dye, or not be Married, or incapacitated to dispose thereof.

The Defendant insists, that the Plaintiff having a very considerable Estate from the Testator by the said Will, which would have descended to the Defendant *Florence*, in case she had been born and living at the time of the Death of her said Father, and that the Plaintiff cannot have any pretence to the interest of the said 3000 *l.* as aforesaid, for that there is not any Clause or Direction in the Will touching the same.

Portion and Interest devised upon a contingency of dying or Marriage decreed to be paid into Court for the benefit of the Heir according to the Will, in case of the Devisees death.

This Court declared the 3000 *l.* and Interest over and above the said 80 *l. per Annum*, belongs to the Plaintiff, in case the said *Florence* dye before she receive the same by the said Will, and Decreed that the Interest of the 3000 *l.* be paid into Court, and not to be taken out, without good Security, given by the said *Helena*, to make good the Benefit thereof to the Plaintiff, in case the said *Florence* dye before 21 years, or Married as aforesaid, as the Will directs.

Elvard

Elvard contra Warren & al, 31 Car. 2.
fo. 350.

THe Defendant being in Contempt for Prisoner
disobeying a Decree, and being a by *Habeas*
Prisoner in *Bristol*, a *Habeas Corpus cum* *Corpus*
causis, was ordered to bring him to the brought
Bar of this Court, who was brought from *Bristol*
up, and turned over to the *Fleet*, who and turned
is there a Prisoner, and refuses to obey *Fleet*, for
the said Decree. that he was

The Court ordered a Sequestration a in contempt.
gainst his Real and Personal Estate.

Warner contra Borsley, 31 Car. 2.
fo. 629.

THe question being, whether a Devise Devise.
of the Plaintiffs Father by his
Will of his Personal Estate, and Debts
to the Plaintiff in remainder after the
death of his Mother, and the Devise
thereof to her in the first place, she
being Executrix to the said *1st*. Testa-
tor, and the Defendant her Executor,
were good or not.

The Plaintiff insisted, That the Devise
of the personal Estate by the Will of the
Testator to his Wife, was an absolute De-
vise to her by operation of Law and was
vested in her, and so consequently in the

Defendant, who is Executor of the said *Alice*, by virtue of the said Executor, and the Devise or Limitation over to the Plaintiff after the death of his said Mother, who was Executrix of the first Testator, was absolutely void in Law, and the said Defendant as Executor to the Plaintiffs said Mother, is well intituled to the said personal Estate, devised by the Testators said Will.

The Plaintiff insisted, That the Devise to the Plaintiff in Remainder, after death of his Mother was a good Devise, and ought to be countenanced, the rather in regard such Devise in the life time of the said Testator and Testatrix was consented, and agreed to by the Relict and Executrix, and so decreed at the former hearing.

Devise of a
Personal E-
state in Re-
mainder af-
ter the death
of J. S. is a
void Devise
and Vests
wholly in J. S.
she being
Executrix.

This Court declared, That the Devise of the personal Estate to the Plaintiff in Remainder was a void Devise, and the said Estate to the Testator immediately thereupon did Attach and vest in the said *Alice*, his Relict and Executrix, and the Defendant as her Executor, was, and is well intituled thereto, and decreed accordingly.

Brodhurst

Bredbust contra Richardson, 31 Car. 2
fo. 695.

THat *Samuel Russell* by his Will, gave to his three Daughters, *Sarah*, *Christian* and *Elizabeth* 540 l. to be divided amongst them, viz. For each of them in particular 180 l. but if any one or two of them, should dye without leaving a Child, that the Daughters should Inherit one anothers Goods, Monies, Lands and Chattels, which the deceased should leave behind them, and that the Plaintiff intermarried with the said *Elizabeth*, and that she died without leaving a Child, before payment of the said 180 l.

The Plaintiff insists, That he as Administrator to the said *Elizabeth* his Wife, is intituled to the said 180 l. and her share of the said Goods.

The Defendant insists, That by the words and true intent of the Testator and the said Will, the same doth not belong to the Plaintiff, but came or in Equity belongs to the Defendants, as Surviving Sisters.

This Court declared, the Plaintiff is well intituled to the said 180 l. and decreed accordingly.

Turner

Turner contra Turner, 31 Car. 2.
fo. 102.

THat the Plaintiffs Father lent to *Ayloff* 700 l. and 200 l. at another time, for which *Ayloff* Mortgaged Lands to the Plaintiffs Father and his Heirs, with proviso, that on payment of 600 l. to the said Plaintiff Father or Heirs, then the premisses to be reconveyed to *Ayloff*; that the Plaintiff is Executor to his Father and Brothers, and so claims the Mortgages, as vesting in the Executors of his Father, and not in his Heirs.

The Defendant being the Son and Heir of the Plaintiffs eldest Brother deceased, and Grandson and Heir to the said Plaintiff's Father, insists, That the Plaintiff and Defendant, and others who claimed several shares, and parts of the Plaintiffs Fathers personal Estate agreed to a Division thereof amongst themselves, and a Division was made, and Releases given of each ones demands in Law or Equity to the said Estate, and the Plaintiff in particular released, and the said *Ayloff's* Mortgage with the Mony due thereon with other things, was set out and allotted to the Defendant by consent of all the parties, and received by the Defendant in part of his share, and the Plaintiff accounted to the
the

the Defendant for the profits of the said *Ayloffs* Mortgaged premisses received by him, and afterwards in 1664, the Defendant had a Decree for the Mortgage Mony against *Ayloffs* Executor, and received the same, to which proceedings the Plaintiff was privy, and the Defendant says it is unreasonable, that the Plaintiff should now make a demand to the said Mortgage, to unsettle matters so settled by his own consent; but the Plaintiff insists, he looked on the premisses at that time to come to the Defendant as Heir, and knew not his own Title thereto, and the shares set out came but to 250 *l.* apiece, and *Ayloffs* Mortgage was worth 800 *l.*

This Court is of Opinion, that the Plaintiff ought to be relieved, and had an undoubted Right to the said Mortgaged premisses, and decreed the Defendant to repay all the Mony received by him thereon to the Plaintiff.

The Heir is decreed to have a right to a Mortgage in Fee and not the Executor.

Bois contra Marsh, 31 Car. 2.
fo. 441.

Land Legatees, and Mony Legatees decreed to abate in proportion notwithstanding an Agreement to the contrary.

THis Court declared, That all the Legatees both Land Legatees and Mony Legatees ought to abate in proportion, notwithstanding the Agreement to the contrary, and that the said Agreement be set aside.

Audley contrary.

*Audley contra Dom' Audley, 31 Car.2.
fo.848.*

Power to
make
Leases, if
well pur-
sued.

THe Bill is to set aside a Lease made by Sir *Henry Audley* the Plaintiffs Father, to the Defendants, as Trustees for the Defendant the Lady *Audley* for 99 years, if *Henry, Francis* and *Ann Audley*, Children of Sir *Henry* by the Defendant the Lady *Audley* should so long live, paying yearly so much Rent as amounts to two parts in three of the yearly Value of the said Houses, according to the best improved Value.

But the Plaintiff insists, The said Lease is not made pursuant to the power reserved to the said *Henry* by a Deed of Settlement made by one *Packington* in 4 Car. 1. in Consideration of a Marriage between the said Sir *Henry* and *Ann*, one of the said *Packingtons* Daughters and Coheirs; by which it was declared, That the benefit of such power in the said Sir *Henry* to make Leases, was to be for the younger Children of the said Sir *Henry* by the said *Ann* his first Wife; and the said Lease was not well gained from Sir *Henry*.

The Defendant insisted, it was made pursuant to the power, which was, That Sir *Henry* should have power to make Leases,

Leases, for a provision of any thing he should have, or otherwise as he should direct. Which Matter was referred to the Lord Chief Justice *Hales*, who declared the power good, and that Sir *Henry* had pursued that power.

The Plaintiff insisted, That the Rent reserved is altogether uncertain and lies only in Averment, and that if the Value averred by the Plaintiff should in the least be disproved, the Plaintiff would be Nonsuited in any Action: And so insisted, That it was proper for this Court to fix and establish that for a standing Rent, which can be made out to have been two parts of the best improved Value at the time of making the said Lease, and that the Rent so to be ascertained, the Defendant might Covenant for constant payment thereof.

This Court, on perusal of the said Lease and power, and of the Lord *Hales* Opinion, declared the said Lease to be good and sufficient, and that unless proof be made of a greater value than the Sum of 290 *l.* which hath been constantly paid by the Defendant the Lady *Audley*, and accepted of by the Plaintiff, that the said Sum must be taken as two parts of ^{Two parts in three of the improved value} reserved as a Rent by a power, the constant payment of such a Sum at the time of making the said Lease, decreed to be paid whether the premises rise or fall.

the

the full value of the premisses at the time of making the said Lease, which, or the greater Value, if so proved, is to continue to be paid, whether the said premisses rise or fall in Value; and decreed accordingly.

Hetherfell contra Hales, 31 Car. 2.
fo. 845.

200 *l.* allowed a
Trustee for
Charges and
Expences
in managing
a Trust.

THe Question in the Case is touching 2500 *l.* demanded by the Defendant, for his Charges and Expences in managing the Trust in question, which began in 1668. and continued till this Defendants Answer was put in, in which time the Defendant received 20000 *l.* and paid the same all away to the Creditors, and the Plaintiff had not surcharged the Defendant 6 *d.*

This Court took till this day to consider what was fit to be allowed in a matter of this nature, and having considered that the Defendant was a Friend to the Family, and undertook the Trust at their great Importunity, he having a considerable Estate when he undertook the Trust, and considering the charges of Surveying the whole Estate, setting and letting the same, looking after Tenants, adjusting their Accounts, calling in their Rents, returning Monies to Creditors, and

and treating with and stating their Debts, and procuring and agreeing with Purchasers, and for Law-charges, and for keeping Servants and Horses, and employing others in Journeys to *London* and elsewhere, and his Care there (lying from home a long time) was of Opinion, That the Defendant might well deserve the whole 2500 *l.* yet doth allow but 2000 *l.* which the said Defendant is to have.

Ray & Ux^e ejus contra Stanhope, 31 Car.2. fo. 809.

THE Bill is, That *Sir Edward Stanhope*, the Plaintiff *Elizabeths* Grandfather by Deed demised Lands to Trustees for ten years after the said *Edwards* death, upon Trust, that they should out of the Profits pay to the Plaintiff *Elizabeth* for her Maintenance 20 *l. per annum* until her Age of 21. and should further pay to the Plaintiff *Elizabeth* at her Age of 21. if she so long keep unmarried, 1000 Marks for her Portion: That the said *Sir Edward* died, leaving Issue *Edward Stanhope* the Plaintiff *Elizabeths* Father his Son and Heir, she being then 12 years of Age: That after *Sir Edwards* death the Trustees did not intermeddle, but left all to the management of the said Plaintiffs Father, who received all the Profits, and on that

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Trust.

Consideration, *Edward Stanhope* the Plaintiff's Father demised to Trustees the said premisses, the Reversion of which he was seized in Fee *expectant* upon the said Term of 10 years, and other Lands, whereof he was Seized in Fee, to hold for 20 years upon Trust, to pay the Plaintiff *Elizabeth* 20 *l. per Annum*, until her Marriage, and 500 *l.* after her Marriage, in such manner as in the said Deed for 20 years is expressed, and the same was said to be made in consideration of the Preferment the said Sir *Edward* intended for the Plaintiff *Elizabeth* his Grandchild, that the Plaintiff received the profits of the premisses, in the said former Lease, during the 10 years, and profits of the Premises in the said latter Lease, so long as he lived, and maintained the Plaintiff, and in 1658. the Plaintiff *Elizabeth's* Father dyed without Issue Male; but in his life after the said Lease for 20 years, settled the premisses with other Lands of 500 *l. per Annum*, upon the Defendant his Brother, without any consideration, save natural Affection, and the Defendant hath since received the profits that the Plaintiff *Elizabeth* was unmarried at her Fathers Death, and was his only Child, and about nineteen years before the Bill exhibited, she Married *George Stanhope* who dyed, and about 7 years since she Married the Plaintiff *Ray*, so to have Satis-

Satisfaction of the 20 *l. per annum* from her Fathers Death, to the time of her Marriage with *George Stanhope*, and the 500 *l.* and Interest from her said Marriage; but the Defendant refuseth to pay the same, pretending the said several Terms are expired, and that the Lands of 60 *l. per Annum*, descended upon the Plaintiff *Elizabeth*, by her Fathers permission, in Satisfaction of the said Money; but the Plaintiff insists, the Lands descended to her from her Father, were charged with 500 *l.* which she hath paid, and she had no other provision made for her out of her Fathers Estate, and that the Defendant had an Estate of 500 *l. per Annum* come to him by a voluntary Settlement from the Plaintiffs Father.

The Defendant insisted, that if the Plaintiff *Eliz.* Father did make such demise for 20 years, he had no power so to do, being but Tenant for life, by a Settlement made by the said Sir *Edward*, and so the Defendant not liable to pay the Moneys, and the Defendant claims the Lands and Premises by vertue of a Fine and Settlement made by the said *Edward Stanhope* the Plaintiffs Father, wherein the Defendant and his Brother *George Stanhope* joyned, and though the said Defendant is the Heir Male of this Family, yet he receives little there out of the said Estate,

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the same being charged with 86 *l. per An.* and the Plaintiff hath not only enjoyed the said 62 *l. per ann.* charged only with 500 *l.* but also as Administrator to her said Father, received out of his Personal Estate 600 *l.* and if she should have the 500 *l.* in question also, she would have a greater share out of the Estate, than the Defendant.

Arrears of Annuity decreed to be paid, and also a portion of 500 *l.* upon the Defendants owning it in a Letter.

This Court, upon reading a Letter from the Defendant, wherein he owns the 500 *l.* to be due to the Plaintiff *Elizabeth*, on her Marriage, and 20 *l. per Annum* in the mean time, or to that effect, declared the Defendant ought to pay the Arrears of the said 20 *l. per Annum*, from the death of the Plaintiffs Father, to her Marriage with her first Husband, and also the 500 *l.* with the Interest thereof, from the time it was raised out of the profits, and decreed the same accordingly.

Dom. Blois & al' contra Blois & al'

31 Car. 2. fo. 723.

Will.

THE Bill of the Plaintiff, Dame *Jane Blois*, and of *Jane* her Daughter, by Sir *William Blois*, is (*viz.*) that the said Sir *William Blois*, Father of the said *Jane* the Infant, being Seized of Lands by his Will, gave all his Real and Personal Estate to the Defendant Dame *Elizabeth*, to the Plaintiff Dame *Jane*, and to the Defendant *Mary Brook*, and *Abigail Hodges*, provided that

that his Son *Charles Blois*, should have 300 *l. per Annum*, thereof, and all his Goods should be equally divided amongst his 4 Children, as soon as the said *Charles* should by a Match, raise 9000 *l.* to be paid to his Sisters, and made the four Children Executors, and dyed, whereby the Plaintiff Dame *Jane*, and the rest of the Executors, were Intituled to all the Real and Personal Estate, to them and their Heirs as joynt Tenants, in Trust nevertheless for the said *Elizabeth* and *Mary*, and the Infant Plaintiff, until the Sum of 9000 *l.* should be raised and paid unto them, and secured unto them by the Defendant *Charles*, the only Son and Heir of the said Sir *William*.

The Defendants, *Charles*, *Elizabeth*, *Mary Brook*, and *Abigal Hodges* insist, that Sir *William* in his Life time, upon his second Marriage with the said Plaintiff Dame *Jane*, (the Defendants *Charles*, *Elizabeth*, and *Mary Brooke*, being the Issue of the said Sir *William*, by a former Venter) by deed settled a great part of his Estate in Trust for the said Dame *Jane* as her Joynture, wherein provision was made whereby the said Plaintiff *Jane* his Daughter was to have 3000 *l.* out of his Estate for her Portion, and that Sir *William* declared, he intended her no more, and that the Defendants *Elizabeth*, and *Mary*,

Sisters of the whole Blood to the Defendant *Charles*, should have their Portions out of his Estate, made equal with the portion provided for the Plaintiff *Jane* the Infant, as aforesaid, and that the 9000 *l.* to be raised by the Defendant *Charles*, was for all his Sisters Portions, including the said Plaintiff *Jane*, the Infant, but over and above the said 3000 *l.* provided for her by the said Settlement, and hope this Court will not think it reasonable, that the Estate of the Defendant *Charles* shall be charged with the payment of 6000 *l.* for the Plaintiff *Jane's* portion, which Sir *William* never intended to be above 3000 *l.* and insists, that the Plaintiff *Jane* being Sister by the second Venter, ought not to have two 3000 *l.* and they but one 3000 *l.* who are Sisters of the whole Blood, to the said *Charles*, and insist, that the said Will was only in affirmation of the said Settlement, and that the said Sir *William* had no great Fortune with the said Dame *Jane*.

The Plaintiff Dame *Jane*, and *Jane* her Daughter, insist, that by the said Settlement on Marriage with Dame *Jane* to Sir *William*, there was a provision for Issue Males; and if more, then a provision for 3000 *l.* for Issue Females, by which the Plaintiff *Jane* the Daughter claims 3000 *l.* And then Sir *William* by his Will, devising
9000 *l.*

9000 *l.* to be raised out of his Lands for his Daughters Portions (*viz.*) 3000 *l.* apiece, not excluding the said *Jane*, she is as much thereby intituled to a third part of the Estate devised, as her Sisters are to 3000 *l.* apiece; and there was a good Reason for such double Portion for *Jane* the Daughter, in respect the said Dame *Jane* did bring to Sir *William* 500 *l.* *per Annum* Joynture and 1000 *l.* in Mony, and although Dame *Jane* had before her Marriage a separate Maintenance of 250 *l.* a year out of the said 500 *l.* *per Annum*, yet it was paid to, and received for the use of the said Sir *William*, and Sir *William* often declared, it should be made up to her Child or Children.

This Court on reading the Marriage Settlement and Will, by which it appeared that the said Will did operate as well upon those Lands in possession, as those in Reversion, declared there was no proof of any Intention of Sir *William* the Father to make a double Portion for *Jane* his Daughter by a second Venter, and therefore the Plaintiff *Jane* the Daughter ought to have but one 3000 *l.* but that she ought to have it in the first place, whether the Lands in present possession devised, and the said Reversion, which are liable to the said Will, be sufficient or not to raise the whole 9000 *l.* (*viz.*) 3000 *l.* to the

Upon the Construction of a Marriage Settlement and Will, only one Portion decreed of 3000 *l.* and not 6000 *l.*

Plaintiff *Jane*, and 6000 *l.* to the Defendant by the first Venter, and decreed accordingly.

Stewkley contra Henley, 31 Car. 2.
fo. 567.

Will

THat Sir *John Trott* deceased, being seised in Fee of a Rent-charge of 200 *l. per Annum*, but subject to a Redemption on payment of 3400 *l.* by his Will in 1670. devised the said Rent to Trustees and their Heirs, and all benefit thereof on Trust, that they should suffer *Katherine* his Daughter (then the Plaintiffs Wife, and since deceased) her Heirs and Assigns, to receive the same to her and their own proper use: That shortly after the Grantor of the said Rent-charge redeemed the Rent-charge by payment of the 3400 *l.* to the Plaintiff *Stewkley* and his said Wife Dame *Katherine*, whereupon they came to an Agreement by Deed touching the said 3400 *l.* (*viz.*) as to 1400 *l.* thereof should be paid to the Plaintiff, he conveying Lands to Trustees to answer the Interest of the said 1400 *l.* to the said Dame *Katherine* his Wife, in such manner as the said Rent-charge was payable by her Fathers Will, and with further power of Appointment in Dame *Katherine*, to direct the payment of any
part

part of the said 1400 *l.* by her Deed or Will, or other Writing under her Hand and Seal, to the Plaintiff or Children of the Plaintiff and the said Dame *Katherine*; and as to the remaining 2000 *l.* it was agreed it should be put out at Interest, which Interest and such part of the Principal as the said Dame *Katherine* should by Writing under her Hand and Seal, was to be paid by the Trustees as he should appoint, and for want of such Appointment, or as to so much as should not be appointed, in case she did not survive the Plaintiff her Husband, then to her Heirs and Assigns in such manner as the said Rent-charge of 200 *l. per Annum* was demised to her as aforesaid, which 2000 *l.* was put out accordingly: That about 1679. Dame *Katherine* died without making any demise or appointment at all, she knowing the Defendant *Charles Stewkeley* her Son was well provided for; so to have the said 3400 *l.* out of the Trustees hands is the Plaintiffs Suit.

The Plaintiff insisting, That the said A Rent-charge in
3400 *l.* was a Personal Estate, or a Fee (subject
Chose en Action, belonging to the said Dame to Redemption)
Katherine, and so belongs to the Plaintiff devised,
as her Administrator: But the Defendant, the Mort-
the Trustees and the Heir insist, That the gage-Mony
is paid.

Decreed, the Administrator to have it, and not the Heir.

said Mony belongs to the Heir, the said Dame *Katherine* making no Appointment thereof.

This Court declared, That the Matter in demand was originally a Mortgage, and if it had not been Redeemed in the Ladies life time, it would have gone to her Administrator, and the Lady having made no Appointment other than the said Deed as to the 1400*l.* and having only appointed, that the 2000*l.* should go as the Rent charge of 200*l.* *per Annum* by Sir *John Trotts* Will should have gone, which being once a Personal Chattel and not descendible, the operation of Law could not be controlled, but that it ought (being a Personal Estate) to go according to the course of Law to the Plaintiff, he being Administrator, the rather for that the Heir is amply provided for, otherwise his Lordship declaring, that the Lady *Stewkley* not having made an Appointment it ought to be taken for her Intention, that the Plaintiff should have the Mony, and therefore decreed the Defendants, the Trustees, to convey to the Plaintiff and deliver to him 1400*l.* and the Securities for the 2000*l.*

Green contra Rooke, 31 Car. 2.
fo. 351.

THat *Lawrence Rooke*, Father to the Defendant *Heyman Rooke* and to the Plaintiff *Mary*, being seised in Fee or Fee-tail, or other Estate of Lands, by Deed of the 26th of *August* 1650. granted the premisses to *Edward Scot* and others for 80 years, if he so long lived, and afterwards conveyed the same on the 27th of the same Month unto Sir *Henry Heyman* and *Peter Heyman*, and their Heirs, for the term of his life, and by Deed the 20th of *October* then next following, and by a Recovery in pursuance thereof the said premisses were settled on the said Sir *Henry* and *Peter Heyman* and their Heirs, for the life of the said *Lawrence*, Remainder as to part to the use of *Barbary*, Wife of the said *Lawrence* for her life, for a Joyn-ture, and after as to part to the said Sir *Henry* and *Peter Heyman* for 99 years in Trust, to raise 1000 *l.* for the portion of the eldest Daughter of the said *Lawrence*, and then to the use of the first Son of the said *Lawrence* in Tail Male, with the Remainder over: That the said *Lawrence* and *Barbara* are dead, and the Defendant *Heyman Rooke* is his first Son, and the Plaintiff *Mary* is his eldest Daughter, and the

Devise.

the Portion of 1000 *l.* is due to her, and the same being unpaid, *Peter Heyman* the surviving Trustee assigned the term of 99 years to the Plaintiff *Greene*, to enable him to raise the Mony; and the Defendant *Heyman Rooke* hath mortgaged the same premisses to the other Defendants; so the Question is, Who hath the right or equity of Redemption, and the Bill is also to have the Plaintiff *Maries* Portion paid, or the equity of Redemption foreclosed.

The Defendant *Heyman Rooke* by Plea insisted, That *George Rooke* his Grandfather by Will in 1647. devised the premisses unto *Lawrence Rooke* his eldest Son, and Father to the Defendant *Heyman Rooke* for life only, Remainder to the first, second, third and fourth Sons of the said *Lawrence* in Tail, Remainder to *John Browne* and others for their lives in Trust, for the better securing and preservation of the several Remainders limited unto the several Sons of the said *Lawrence Rooke* with Remainders over: That the said *George Rooke* died without revoking or altering the said uses limited in his Will, and so *Lawrence Rooke* could not by the said Deeds or Recovery bar or cut off the Remainder limited in and by the said Will, in regard the said *Browne*, and the other

other Trustees, for preserving of the contingent Remainders were living since 1650. in which year the term of 99 years was created.

This Court declared, That the term limited to the Trustees in the Will for their Lives, for the preservation of the contingent Remainders to the several Sons of the said *Lawrence Rooke* was a good Term, and a State to support the said contingent Remainders, notwithstanding the same is limited to the said Trustees, and inserted in the said Will, after the limitation to the first and other Sons of *Lawrence Rooke* in Tail Male, for the same being in the Will, and the intent of the Testator plainly appearing so in the Will, they held the said Plea and Demurrer to be good, and so dismiss the Plaintiffs Bill.

Devise to Father for life, Remainder to the first Son, &c. Remainder to Trustees for 99 years to support the Remainders, its a good term to support the Remainders, notwithstanding the same is limited and inserted

after the limitation to the first Son (it being in the case of a Will.)

Trethervy

*Trethervy contra Hoblin, 26 Car. 2.
fo. 114.*

Bill to discover a Title.

THE Plaintiff being a Purchaser of the premisses, calls the Defendant to discover his Title, who insists on a long Lease of a 1000 years, which was found by Verdict for the Defendant.

Costs.

And the Defendant insists for Cost, for that the Plaintiffs Suit in this Court was causlessly and vexatiously brought by the Plaintiff.

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The Plaintiff insists, That he being not able to try the validity of the said Lease at Law, during the life of *Oliver* one of the Defendant.

Suit for discovery, and to preserve Testimonies and the Plaintiff to pay no Costs.

This Court is satisfied, that the Plaintiff had good ground to bring this Suit for a discovery and relief, and to preserve the testimony of his Witnesses, it falling out to be a severe Case upon the Plaintiff, so no reason for the Plaintiff to pay any Cost either at Law, or in this Court.

*Broughton contra Butter, 32 Car. 2.
fo. 379.*

THIS Cause was referred to Sergeant *Rainsford*, to certifie touching the Inclosure, whether advantagious, and whether the Parties had consented thereunto, who

who had drawn up a Certificate, all written with his own Hand, but he dying before he had declared the same.

Certificate ordered to be filed, though not delivered in the life of the Certifier.

It was prayed by the Plaintiff, that the said Certificate might be filed, and taken to be authentick, as if he had delivered the same to either party.

The Defendant insisted, That the said Certificate had no date, and that the Sergeant never intended to deliver the same.

This Court Ordered the said Certificate to be filed, notwithstanding the Objections made thereto by the Defendant.

Tucker contra Searle, 31 Car.2. fo.423.

That *John Bassano*, the Plaintiff *Frances* Father, by deed, 20 July 1640. Marriage in consideration of a Marriage between Settlement. him and *Elizabeth*, the Plaintiff *Frances* Mother, and a Marriage Portion, Covenanted to stand seized of Lands to the use of the said *John* and *Elizabeth*, for their lives, and after to the first Son of the said *John* and *Elizabeth*, and so to the second third and other Sons, and the Heirs of their Bodies, remainder to the right Heirs of the said *John Bassano* the Elder for ever, on Condition and Limitation, that if the said *John Bassano*, should have Issue Female, and not Issue Male by *Elizabeth*

zabeth, then his Right Heirs to pay the first and second Daughters of the said *John* by the said *Elizabeth* 300 *l.* a piece, to be chargeable on the said Lands, and if more than two Daghters, then the said Lands for the full value of them to be sold, should equally be divided amongst such Daughters; that the said *Bassano* had no Issue Male by *Elizabeth*, but had Issue Female (*viz.*) *Elizabeth* their Eldest Daughter, the Plaintiff *Frances* their Second, and another *Elizabeth* their youngest, that *Elizabeth* the Eldest died in the life of her Father and Mother, and that at the death of *John* the Father, there being only the Plaintiff *Frances* living, but the said *Elizabeth* the Mother being ensigned with *Elizabeth* the youngest Daughter of the said *John Bassano*, by Will (*John Bassano* taking notice of the aforesaid deed) provides, that in case *Elizabeth* his Wife were with Child of a Son, then his Executors to pay to the Plaintiff *Frances* 300 *l.* but if a Daughter, then he had otherwise provided for the Plaintiff *Frances*, and such Daughter by deed, and shortly after dyed, leaving *John Bassano*, his Son and Heir by a former Venter, and shortly after the said *Elizabeth* the youngest Daughter was Born, and died in a Month after, and in 1666. *Elizabeth* the Mother dyed, leaving the Plaintiff *Frances*, whereupon

upon *John Bassano* the younger, took the Plaintiff *Frances* in Guardianship, and having the said Will and Deed in his Custody, pretended to her, she had but 300 *l.* Portion left her by her Father. That in 1669. the Plaintiff *Tucker* and the Plaintiff *Frances* inter-married, and *John Bassano* still concealed the said Will and Deed; that the Plaintiff *Tucker*, and *John Bassano* the younger agreed, that the 300 *l.* left to the Plaintiff *Frances* by her Father, should be laid out on Security or Purchase, for the benefit of the Plaintiff *Frances* for life, in case she survived the Plaintiff *Tucker*, and accordingly the Plaintiff *Tucker* Sealed a Deed 10th of December 1669. whereby the Plaintiff released the said 300 *l.* to the said *Bassano* the younger, upon Trust, and the said *Bassano* Covenants with the Plaintiff, that he his Executors or Administrators, should either continue the said 300 *l.* in his or their Hands at Interest, or lay out and dispose of the same upon Security or Purchase, and permit the Plaintiff *Tucker* during his life, and the Plaintiff *Frances* during her life, to receive the Interest and Benefit thereof, and to the Plaintiff *Tucker* and his Heirs, Executors, &c. That in 1671. *Bassano* the younger died, and made the Defendant *Searle* his Executor, and the said *Searle* refused to pay the said 300 *l.* pretending the want of Assets.

And

And the Plaintiff *Tucker* insists, to have the said 300 *l* and interest to be chargeable out of the *Walthamstow* Lands, in regard the said Lands were originally charged therewith; but the Defendant the Executor says, the said Lands are sold by him to one *Woots*, and the Plaintiff *Tucker* insists, that such Sale was without notice of the Plaintiffs Title, and charge of the said 300 *l* on the said Lands, and that *Woots* had Collateral Security to secure him against the Plaintiff, wherefore in regard the said Lands were Originally charged with 300 *l*. and the Plaintiffs were drawn in, to accept of the said Covenant, which is but a personal Security by the contrivance of *Bassano* the younger, who kept the Plaintiff ignorant of the said Deed and Will, for that the Plaintiffs Release is only upon Trust for payment of the said 300 *l*. the Plaintiffs do insist, that in equity the said Lands ought still to be chargeable with the said 300 *l*. and interest, and ought not to rely on the said Covenant.

The Defendant *Searle* insists, that *Bassano* Junior by his Will devised the *Walthamstow* Lands to be Sold for payment of his Debts and Legacies, which was Sold to *Woots* as aforesaid, for 1260 *l*. and gave him Collateral Security, by Bond of 1500 *l*. to secure him against the Plaintiffs demands, and that the whole Personal Estate

state of the said *Bassano* Junior, by Sale of Lands and otherwise, fell short to pay the Plaintiffs demands, the said *Searle* the Executor, having paid Debts of a higher nature, and say that the Plaintiff cannot have their whole demands, but must come in proportion with other Creditors.

And the Defendant insists, That the *Walthamstow* Lands, ought not to be charged with the said 300 *l.* for that on a Bill in this Court, exhibited by the Plaintiff against *Bassano* Senior, whereby the Portions of the two *Elizabeths* Sisters of the Plaintiff *Frances*, were demanded to be chargeable on *Walthamstow* Lands, and alledged, that *Bassano* Junior, had secured the 300 *l.* being the Plaintiff *Frances* Portion, by the said deed of Covenant, and prayed to have the said two *Elizabeth's* Portions, or the value of the Lands, deducting the 300 *l.* secured to the Plaintiff *Frances*; and in *October 25. Car. 2.* it was decreed, that the Plaintiff should have the 300 *l.* which belonged to the youngest *Elizabeth*, and the said Lands to be chargeable therewith. But the Court then declared, they could not decree the 300 *l.* claimed by the said Plaintiff *Frances* in her own right, but that she must rely on the said Deed of Covenant, Defect in Bill. for that they did not complain thereof by their Bill: And the Defendant insists, that the said decree being Signed and Inrolled,

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the said 300 *l.* ought not to be charged on the said Lands, but that they ought to rely on the said deed of Covenant, they having thereby released the said Lands.

Cross Bill for
Creditors, to
take their
proportiona-
ble shares,
but the debts
having been
paid to them
and releases
given dis-
mist.

That the Defendant *Searles* cross Bil l, is for relief against a Bond of 600 *l.* on which he is Sued at Law, and for Equity did insist, That he was Sued here by the Plaintiff *Tucker* and his Wife, for the 300 *l.* aforesaid, and that there was a decree against him in this Court, at the Suit of one *Whitton*, one of the Defendants to that Bill for 700 *l.* so that if the Plaintiff *Tucker*, and other Creditors should recover their demands, there will not be Assets, and therefore prayed, that the Plaintiff *Tucker* and *Callwall*, might take their proportionable shares of what Assets was left, but the Plaintiff *Tucker* insisted, that the said 300 *l.* was originally charged on *Walthamstow* Lands by the said Marriage Settlement, and was not discharged by the said Covenant or Release.

The said other Creditors, *Callwall*, &c. insists, That they have a Verdict against *Searle* the Executor, for the Money due on the said Bond, upon Evidence of Assets in Hands, and had taken him in Execution, and he had paid the said Money thereon, and the said Creditors had released the said debts, and therefore ought not to be farther troubled for the same.

This

This Court declared, the said *Waltham* Lands origi-
flow Lands were originally charged with the nally char-
 Plaintiffs 300 *l.* and that the said deed of gged with the
 Release and Covenant being made only in payment of
 Trust for payment of the said Money, a release and
 and when the Plaintiffs were not told of covenant in
 the said Deed and Will, did not discharge Trust doth
 the same, but the said Lands ought to not dis-
 make it good without damages, although charge the
 there were not Assets in the Executors same.
 Hands, in regard the said Lands were sold
 under notice of the Plaintiffs demands ;
 and further declared, he could not relieve
 the said *Searle*, as against the said *Callwall*,
 for that he by Coertion of Law had paid
 the Money recovered against him, and the
 said *Callwall* had released the same to him,
 and dismiss *Searles* Bill.

Annand contra Honywood, 32 Car.2.
 fo. 430.

THe Bill is to have a discovery of the The Custom
 Estate of *Benny Honywood*, the of London
 Plaintiff *Sarabs* Father, whereby the Pla- for Orpha-
 tiff *Annand* in right of his Wife, might nage part.
 have an equal dividend thereof according
 to the Custom of *Lond.* on the said *Benny*
Honywood, being a Freeman of the said
 City, who having only two Children, the
 Plaintiff *Sarah* by his first Wife, and the
 Defendant *John* by his second Wife, he

married the Plaintiff *Sarah* to one *Brown* in 1657, and gave her but a small matter at present, saying, That when he died she should come in for a customary part of his Estate, and 9 years after the said Marriage, made his Will in 1660. and thereby devised all his Personal Estate, to be divided into three equal parts, according to the Custom of *London* (viz.) one to his Wife, and another between the Plaintiff *Sarah*, and the Defendant her half Brother, and thereby declared, that what the Plaintiff *Sarah* had in Marriage with the said *Brown*, should be accounted as part of her share of that third part, and out of the other third part, which he had power in himself to dispose of, and thereby declared to be only reserved to himself, he appointed his Executor, which was his Wife and the now Defendant, to pay to the Plaintiff *Sarah* for her support for her life, and to be in no part of her Husband *Brown's* Estate, and 30 *l. per Annum*, and 300 *l. in Money*. That the Plaintiff *Sarah's* Husband died in 1670, and she in 1672. with the Testators consent, Married the Plaintiff *Annand*, and in 1678. the Testator died, and the Testators Wife died before, so the Plaintiff became intituled to a full Childs part and share of the Personal Estate, being 10000 *l.*

The Defendant insists, That the Testator

tor did on the Plaintiff *Sarahs* first Marriage, give her a considerable Marriage portion in present, and promised to leave her 200 *l.* more at his death, which was to be her full advancement, and did not intend she should come in for her customary share; and insists, That in 1675. the Testator made his last Will, and thereby gave the Plaintiff *Sarah* a Legacy, and Legacies to her Children, reciting, That he had already advanced her at her first Marriage, and that he had then promised to leave her 200 *l.* more at his death, and that the Legacies were given to the Plaintiff *Sarah*, in full of all such share and claim, as she might after his death have right to, or claim in any of his Estate, by virtue of the Custom of *London*, or otherwise; and insists, That the Plaintiff by the said Advancement on her first Marriage, her Father the Testator, having not declared his Will or other Writing under his Hand, that she was not fully Advanced, but declared the contrary by the last Will, she is thereby barred and excluded, by the Custom of *London*, from any other claim out of his Estate, then what is bequeathed by the last Will, being 500 *l.* which the Defendant will pay, she giving a general Release, which said last Will, provides she shall do.

The Plaintiffs Counsel insists, That the

said Declaration in the Will of 1666. was the Testators first Declaration of his intent, upon the marriage of the said *Sarah*, and that it was, being still under his Hand in writing, as sufficient, and vallid, as if it had been any other writing, and that it was produced not as a Will, but as an Evidence, and is still a writing under the Testators Hand, declaring, That his first Wives Daughter the Plaintiff *Sarah*, was by him but partly Advanced, and that she was by the Custom of *London*, to have an equal Childs part of his Personal Estate, with his second Wives Son, and then, that he could never by a Subsequent Will, oblige her to 500 *l.* Legacy in full, of all that is due to her by the Custom of *London*, without her consent, and the words of the last Will, by forbidding the Plaintiff *Sarah* to Sue for the Customary part of his Estate, or upon the account of not being fully Advanced, do strongly imply the intent at the marriage was, that what his said Daughter had in marriage, was but part of her Advancement.

The Defendants insist, That by the Custom of *London*, a Declaration to let in a Child for a Customary part, ought to be by the Testators last Will, or by some other writing under Hand, remaining in force, and unrevoked, and that it ought to be an expresse Declaration, which the Will

Will in 1666. is not, and the Testator declared by his last Will, that the Plaintiff *Sarah* was already Advanced upon her first marriage, and that the Testator promising, to leave her 200 *l.* more at his death, implies, that it was agreed, that she should have no more, and the Will in 1666. is Revoked and Cancelled, and the Testators hand remains only to the middlemost sheet thereof.

This Court declared, they would be Certified by the Recorder of *London*, whether a Declaration by a Will Revoked, be such a Declaration in writing, to let a Child have a Customary part of her Fathers Estate.

The Lord Mayor and Aldermen, by the Recorder, Certified this Court, That by the Custom of the said City, a Declaration made by a Citizen and Freeman of the said City by writing, with his Name or Mark, Subscribed thereto, though such writing were made for his last Will and Testament, and the same afterwards by him Revoked, is such a Declaration as will let in a Child of such a Freeman to have his or her Customary part of his or her Fathers Personal Estate.

By the Custom of *London*, a Declaration made by a Freeman by writing, tho' such writing were made for his last Will, and Revoked, is such a Declaration as will let in his Child to have a Customary part of his Personal Estate.

The Defendant insists, That the Lord Mayor, &c. were Surprized in making the Certificate, they conceiving themselves streightned in the words and directions of

the Order; for that although the Will of 1666. had never been revoked, yet the same had never been a sufficient Declaration, according to the Custom, to let in the Plaintiff to have a Customary part, and they by the Order being restrained to certify, whether a revoked Will were a good Declaration; they did apprehend they were to take it, That the Testator had by his Will of 66. made a sufficient Declaration, according to the Custom, to let in the Plaintiff, which he hath not done; for the Custom of *London* in this case is, That the Sum certain that any Child had in part of such Advancement, ought to be expressed in such Writing or Declaration, or else the same is not of any avail; and produced Presidents for that purpose, that the same ought to be mentioned to the end, that in case such Child should be admitted to such Customary part it may be known what the Sum is, to the end it may be brought into Hotch-potch with the rest of the Estate to the Testator.

Whereto the Plaintiff insisted, That the Custom of a Sum certain to be mentioned appeared only by a By-Law called *Judd's Law*, in 5 *Ed. 6.* the which is no established Law in the City to bind the Right of any, and there is a great difference in the By Laws in the City; which
ought

ought to respect their Government , and not bind the Right of any person which is governed by the general Custom of the City, and which is paramount to any of their By-laws, and by the Custom the Right of a Freemans Child is as much preserved to him as any mans Right by the Common Law of the Kingdom , besides the naming of the Sum, is no more than in order to the settling the Accounts of the said Estate , which may be done before a Master in this Court.

This Court upon Reading several Presidents on both sides , declared , That the said Certificate was conclusive , and that the Plaintiff must be let in for a Customary part of her Fathers Personal Estate, and decreed the same accordingly.

The Defendant was ordered to Account for all the Personal Estate of *Benny Honeywood*, and the Plaintiff thereout to have her Customary part, her Marriage Portion being brought into Hotch potch with the rest of the Personal Estate, and the Plaintiff to discover the said Portion on Oath, and the Defendant to do the like as to what provision he had. Fo. 598.

The Defendant insists, What provision he had was Money deposited by his said Father in the hands of Mr. *Colville* and others, to purchase Lands or Houses in or near *London*, in pursuance of Articles between

tween the Defendants said Father and the Defendants Wives Father, which were made before the Marriage of the Defendants, which Lands and Houses so to be purchased is by the said Articles covenanted to be settled on the Defendant and his Wife for life, and for her Joynture Remainder in Tail, and was in consideration of the Defendants wives Portion, and Houses were purchased therewith in *Beunony's* life, and the Defendant is his Son and Heir.

What Money is deposited by the Father to purchase Lands in pursuance of Marriage Articles, is to be taken as Real, and not as a Personal Estate, and shall not be brought into Hotch-potch.

And the Defendant insists, That what was so deposited as aforesaid, is to be taken as if the Defendants Father himself had purchased Lands and settled the same to the uses aforesaid, and ought not to be accounted a personal Estate of the Defendants Father, but as Land.

This Court declared what was deposited by the Defendants Father to purchase Lands in pursuance of the said Articles, is to be taken as Lands, and not as personal Estate of the Defendants said Father; and also declared what was deposited as aforesaid, shall not be brought into Hotch-potch, but the Defendant is to discover what he had from his Father upon his said Marriage.

Prigg contra Clay, 32 Car. 2.
fo. 198.

THat *John Clay* by his Will devised Will.
100*l.* to the Plaintiff *Philip Prigg*
Jun. and *Deborah Prigg* his Sister, in
manner (*viz.*) 50*l.* to the said *Philip* at his
Age of 21 years, on day of Marriage,
which should first happen by the Defen-
dants his Executors, and in the mean
time the whole 100*l.* to be secured and
improved by his Executors for their use;
and in case either the said *Philip* or *Debo-
rah* should die before payment of their
Legacies, the Survivor to enjoy the whole
100*l.* and if both die before payment
of their said Legacies, then the Testator
decreed the whole 100*l.* to his Sister the
Plaintiff *Elinor* their Mother, besides
100*l.* to her to be paid within 6 Months
after his death.

That the said *Deborah Prigg* died un-
married and before 21, and before she
had received the 50*l.* Legacy, so that the
whole 100*l.* became due to the Plaintiff
Philip Junior.

The Defendants insists, That *Deborah*
died before the Testator, and her Legacy
of 50*l.* became void.

This

Legacies of
50*l.* apiece
given to
two, and if
either die
before 21,
the Survivor
to have all.
One dies
before the
Testator,
yet the Sur-
vivor de-
creed to
have all.

This Court was fully satisfied, though *Deborah* died before the Testator; yet the said Devise of 50*l.* to her did not become void, and being devised over to her Brother *Philip* the surviving Legatee, it belonged to him, according to the devise in the Will, the rather for that it being a contingent Remainder, and might vest after the death of the Testator so long as there was a Survivor it did not belong to the Executors, and for that the Testator, who lived for some time afterwards, did not alter the devise thereof by his Will, nor otherwise dispose thereof in Writing, and decreed the Defendants to pay the Plaintiff the two 50 Pounds: This Order was confirmed by the Lord Keeper.

Sanders contra Earle, 32 Car. 2.
fo. 102.

Will.

THat the Plaintiffs late Husband *Daniel Earle*, or some in Trust for him, was at his death seised in Fee, and also intituled to the Trust of a long Term of the Mannor upon a Sore and Lands in *Com' Nottingham*, which said long Term was in being and subject to be disposed as she should appoint, so that he had full power to settle, devise or charge the same by his Will, and the said *Daniel* in consideration

deration of a Marriage with the Plaintiff and 2000 *l.* Portion, he in 1676. by Will devised to the Plaintiff, besides a Joyn-ture of 1200 *l.* and if she were with Child of a Son, he gave all his Lands and Tenements to such Son in Tail; but for default of such, he gave them to the Defendants his Brother and their Heirs, and if he had a Daughter, he devised to such Daughter 500 *l.* to be paid when she attained her Age of Sixteen, and the same to be secured out of his Lands aforesaid, and made his said Brothers Executors: That the Plaintiff had no Son, but a Daughter, who lived some time and is since dead, and the Plaintiff is her Administratrix, whereby she is intituled to her 500 *l.* presently.

The Defendant insists, That the Plaintiffs said Husband devised to the Plaintiff 1200 *l.* and devised to her all her Plate, Jewels and Goods, and Stock in and about the House at *Normanton*, and made the Plaintiff Executrix till the last day of *August* after the Will, and if she (who was then with Child) had a Son by that time, then she to continue Executrix, otherwise the Defendants to be joynt Executors, and made such devise to the Daughter, and the rest of his personal Estate he devised to his Executrix or Executors: That the Plaintiff *Margaret* having but a Daughter,
the

the Defendants proved the Will, and are intituled to the Legacies therein to them devised, and the residue of the personal Estate; and insists, That if the Plaintiff, as Administratrix to her Daughter, be intituled to the 500 *l.* yet she is not to receive it till such time as it is payable to the Child, if it had not died; neither is the Plaintiff intituled to any of the ready Mony in the House of *Normanton*, which was 407 *l.* by any general Words in the Will.

But the Plaintiffs insist, That by the general Words in the Will, [*I devise all my Goods, Chattels and Householdstuff in and about my House at Normanton*] will carry the said 407 *l.* to the Wife as a particular Legacy, and it ought not to be brought into the Account of the personal Estate.

By the general words 407 *l.* though the Words were general, in a Will, yet considering the Intention of the Testator, who by his said Will having before given to the Plaintiff *Margaret* a Legacy of 1200 *l.* if that he had intended to have given her 407 *l.* over and above the 1200 *l.* he might in the same place of House, to, &c.] 470 *l.* ready Monies in the House shall not pass to the Devisee, she having had a particular Legacy of 1200 *l.* devised to her by the said Will.

the Will have given her 1600 *l.* as well as 1200 *l.* and therefore conceived that the Plaintiff ought not to have the 407 *l.* but this same ought to come in to the Account of the Personal Estate, and decreed the same accordingly; and as to the 500 *l.* claimed by the Plaintiff, as Administratrix to her said Daughter, whether the same ought to be paid presently or not, till such time as the said Daughter might have come to the Age of 16 years, if she had lived, being the next Question.

This Court declared and decreed, That the same shall not be paid until such time as the said Daughter might have attained her Age of 16 years, if she had lived, but the same to stand charged on the Estate, subject to the Sum by the Will unto that time, and then the Sum to be paid to the Plaintiff, her Executors, Administrators, or Assigns, by the Defendants, their Heirs and Assigns.

Legacy to be paid at 16 years of Age. Legatee dies before; her Administratrix shall not receive it till the 16 years end.

Edward

*Elvard contra Warren, 32 Car. 2.
fo. 255.*

Sequestra-
tion.

THe Plaintiff having a Sequestration against the Defendants real and personal Estate for non-payment of 536 *l.* decreed to the Plaintiff, the Plaintiff prayed the same might be paid him out of the Defendants Estate, so far as it will extend, and out of the Security given by the Defendant for abiding the Order on Hearing, and also prayed, for that some part of the Defendants Estate now under Sequestration is a contingent Term, which will determine upon the death of one person, whereby the Plaintiff may lose his said Debr: That the Commissioners of the Sequestration may be empowered to sell the said Estate; and prayed also, in regard the Defendants Estate is not sufficient to satisfy the Plaintiffs said demand, that a Recognizance given by the Defendant, to abide the Decree may be produced and inrolled.

This Court Ordered the said 536 *l.* Interest and Costs to be paid by the said Defendant; or out of the Sequestred premises, or the Security before-mentioned, and that the Commissioners of the Sequestration, and the Commissioners have power to sell the Term, to raise the same.

stration

stration do sell such of the sequestred premisses as are held for any term for the best price, and the Mony thereby raised to pay the Plaintiff, towards satisfaction of his demands.

The Question is, Whether the Defendant being charged in Prison in *Bristol* with a Decree of this Court; can be discharged without satisfying the Decree, it being insisted on, that a Decree in this Court is not a Judgment to detain the Defendant.

This Court declared, That a Decree in A Decree
this Court is as effectual to charge the in Chancery
person of the Defendant, as an Execution as effectual
at Law; and the Defendant being charged to charge
with the Decree, the Court declared, if the person,
the Warden of the *Fleet* let him go it as an Execution at
should be at his peril. Law.

Glenham contra Statvile, 32 Car. 2.
fo. 755.

These being cross Causes, the Defendant *Charles Statvile* exhibited his Bill to be relieved against the Plaintiff and his Wife touching a Rent charge, for which the Plaintiff and his Wife by their Bill claims; and the Defendant *Judith Statvile* exhibited her Bill against the Distresses, pretending the Lands out of which the Annuity issues is her Joynture: Which
O Causes

Causés being heard, a Trial at Law was directed to try, whether the Arrears of the Annuity was paid; upon Trial the Plaintiff obtained a Verdict for 475 *l.* and the Causés coming again to be heard, it was decreed, that the Defendants should pay the 475 *l.* with Interest and Costs, which Costs were afterwards taxed to 226 *l.* and that Report confirmed, and a Writ of Execution of the said Decree and Report left at the Defendants House, and Mony demanded, and for Non-payment an Attachment issued against the Defendant *Charles Statvile*, who appeared and was examined, and certified, not in Contempt, but upon Arguing the Exceptions to the Certificate; the Defendant was ordered to pay the 475 *l.* and the said Costs, except 100 *l.* thereof which was remitted: But the Defendant did not pay the Mony, and the Plaintiffs Wife being since dead, he hath Administration, and is intituled to the Monies: But the Defendants refuse to pay the same, insisting, That the said Decree and Proceedings are abated, so that the Plaintiff now by his Bill seeks relief in the premisses, and that a *Sub-pœna ad Revivend' Respondend'*, or such other Process as the Matter should require, might be awarded.

The Defendant by Demurrer insists, That in case the Plaintiffs Bill shall be taken for an Original Bill, then it contains no Equity, he having remedy at Law, and that the Plaintiff was a Defendant in former Suits, and by the course of the Court no Defendant, or any that represents him, in case of an Abatement before the Decree or Final Judgment be signed and inrolled, can or ought to revive; the Decree and the Bill does not say, that any Decree or Final Judgment is signed and inrolled, and it is contrary to the Rules of the Court, to make a Decree against the Plaintiff upon his own Bill, and it would be merely vexatious if the Plaintiff should revive his former Proceedings, which if revived the now Plaintiff can have no Final Judgment, contrary to the Prayer of his Answer to the Original Bill, which was, that he might be dismissed, and the Plaintiffs demands by the New Bill are chiefly for Costs of Suits, which are extinguished by the death of the Plaintiffs Wife, and if he were intituled to a Bill of Revivor he could not revive for Costs, there being no Decree inrolled.

No Defendant in case of Abatement before the Decree signed, can revive.

No Revivor for Costs, there being no Decree inrolled.

This Court allowed the Defendants Demurrer, and dismiss the Plaintiffs Bill of Revivor.

*Raymond contra Paroch. Buttolphs Aldgate
in Com. Midd. 32 Car. 2 fo. 517.*

Priviledge.

THE Plaintiff being one of the Kings Waiters in the Port of *London*, and yet used the Trade of a Common Brewer, and executed his said place by a Deputy: The Defendants insist, He is not to be exempted from bearing the Office of Overseer of the poor in the Parish.

The Plaintiff insists, That the Kings Officers who serve his Majesty in Relation to his Revenue, ought to be exempted from Parish Offices, though they executed their places by Deputy, and use an other Trade, they being still liable to answer any misdemeaner committed by their Deputies, and if their Deputies should be absent at any time, they are bound to execute the same themselves, which often falls out, and Presidents of this Nature, have often been found, and hopes this Court will not take away any the priviledges such Officers ought to enjoy in right of their Offices, and that a *Superse-deas* of priviledge be allowed the Plaintiff, and his Writ of priviledge stand.

The Defendants insist, That the Plaintiff driving a Trade of a Common Brewer, and getting Money in the Parish, he ought to bear the Offices of the Parish,
not-

notwithstanding his said Office, and if any Priviledge were due, it ought to be granted by the Court of Exchequer, and not by this Court.

This Court declared, That the Kings Officers ought to have the benefit of their privilege, and the execution thereof by a Deputy, nor his dealing in another Trade, should not in any sort be prejudicial to him, he being to answer for any neglect or misdemeanour committed by his Deputy, for that it is not reasonable that the Kings Servants or Officers, should have nothing else to subsist on, but their immediate Services or Places under his Majesty, and take no other employment on them; and although a privilege of that nature be grantable in the Exchequer, a Writ of privilege under the great Seal was, and ought to be taken in all respects as effectual, and therefore allowed the Plaintiff his privilege.

The Kings Officers privilege from Parish Offices, tho' he drive a Trade in the Parish.

Such privilege grantable out of Chancery, as well as Exchequer.

*Dominus Bruce contra Gape, 32 Car.2.
fo. 723.*

THE question in this case is, whether the Mannour of *Mudghill*, is within the devise of the Duke of *Somerset* by his Will in *August*, 1657. of the Residue of the Estate unfold, for the benefit of his three Daughters, and the Lady *Bruce* his Grand-Child,

Deed.
Will.
Revocation.

Child, or whether it belongs to the Lady *Bruce* only, as Heir at Law, and whether the same be liable, and comprehended in the Trust, together with other Manours and Lands, to Satisfie the 19100 *l.* Debts only, or is subject with the other Lands in the said Deed and Will for Satisfaction of all the debts of the said Duke *William*.

The Case is (*viz.*) that the Plaintiff the Lady *Elizabeth*, Wife of the Lord *Bruce*, is Grand-child and Heir of *William* late Duke of *Somerset*, and Sister and next Heir of *William* also late Duke of *Somerset*, who was the only Son of *Henry* Lord *Beauchamp*, the Eldest Son of *William* Duke of *Somerset* the Grandfather, which said Duke *William* the Grandfather, did by deed the 13 Nov. 1652. Convey to the Lord *Seymour*, Sir *Olando Bridgman*, &c. and their Heirs, the Mannour and Lands in Trust for payment of Moneys to the Lord *John Seymour*, and the Lady *Jane Seymour*: Then upon further Trust to pay Debts, amounting to 19100 *l.* and after in Trust for raising 10000 *l.* for the Lord *John Seymour*, and 6000 *l.* for the Lady *Jane Seymour*, and Trustees to account yearly to the right and next Heir of the said Duke, with a power of Revocation in the said deed, as to all but the said 19100 *l.* debts; and that the said Duke
William

William 19th of *April* 1654. as to a further provision for the payment of the Debts by deed, conveyed to the Earl of *Winchelsea*, and the Defendant *Gape* and others, and their Heirs, the Lands in *Wilts* and *Somerſet*, (worth 30000 l. and ſufficient to pay all his Debts) to himſelf for life, and after for payment of Annuities, and after his death, then to the uſe of the laſt Truſtees and their Heirs, upon ſpecial Truſt, that they ſhould leaſe out the premiſſes, and with the Mony thereby raiſed, and otherwiſe with the profits, pay all ſuch Debts for which the Plaintiff ſtood ingaged for the ſaid Duke, and that the overplus of the ſaid Mony and Profits to be paid, and the Lands unfold, to be conveyed to the right Heirs of the ſaid Duke, wherein was a power reſerved in the ſaid Duke by deed or Will, to revoke the ſaid Uſes or Truſt: That the ſaid Duke by deed, the 20 of *April* 1654. reciting that the Lord *Beauchamp* the Eldeſt Son, died ſince the deed of the 13 of *November* 1652. and had left only one Son, and the Plaintiff *Lady Bruce*, and that the *Lady Bruce* was left unprovided for, and reciting the deed of the 19 of *April* 1654. made an Additional provision for the payment of his debts, which made the Lands the deed of 1652. of a greater value than would ſatiſſie the ſaid Truſt, and therefore

appointed the last Trustees in the deed of 1652. should out of the Money to be raised by Sale of those Land, and the profits thereof pay the Plaintiff *Elizabeth, Lady Bruce* 100 *l. per Annum*, till her Age of 17, and after 300 *l. per Annum*, and then after the debts in the deed of 1652. and Portions to the Lord *John*, and Lady *Jane Seymour*, then to pay *Elizabeth* the the Lady *Bruce* 6000 *l.* portion also, with power of Revocation.

That afterwards the said Duke by Will, 15 of *August* 1657. having as aforesaid, secured the said 19100 *l.* debts, devised to his Son, the Lord *John Seymour*, and the Heirs Males of his Body, the said Manour of *Mudghill*, and because the Lady *Ann Beauchamp* his Sister in Law, had the same as part of her Joynture, and the same was Leased out for the life of *Pleydall*, his Will was, that till the same fell in possession to the Lord *Seymour*, the Trustees in the deed of 1652. should pay him maintenance, and they to convey to him, when they thought fit, and by the said Will, taking notice of the deed in 1652. and of the 19 of *April* 1654. and also of his power of Revocation, appointed and declared the Trusts in those deeds for his Grandson, *William Lord Beauchamp*, and the Plaintiff the Lady *Elizabeth Bruce*, or for the benefit of his Right Heirs, should

should cease, and the same was thereby revoked, and appointed the Trustees in those deeds, to convey the said premisses to the Lady *Frances* his Wife, and the Earl of *South-hampton*, and the Earl of *Winchelsey*, and Sir *Oriando Bridgman*, and the said *Gape* and others, and their Heirs upon Trust, as to *Mudghill*, as he before had declared, and as to the rest of the Mannours and Lands on Trust, for payment of all such debts in the said Indentures to be paid, and unpaid at his death, and for freeing his personal Estate, and Executors from the payment thereof, and of the Trust in the Deed of 1652, for the Lady *Jane Seymour*, and after these Trusts performed, all the Lands unfold and the Reversion thereof be disposed by the Lady Dutcheß of *Sommerfet* his Wife, and the Trustees by his Will and their Heirs for 21 years, from his death to such as the said Lady Dutcheß should appoint, and in default of such appointment, for the raising such sums of Mony for the Plaintiff *Elizabeth's* portion and maintenance, as the Deed of the 20 of *April* 1654 appoints or in default of such appointment by the Dutcheß, to go to such Person to whom the Trust of the Inheritance of the premisses, after the 21 years is limited by the Will, and the conveyance so to be made to the said Dutcheß, and the

the other person named in his Will, should be upon further Trust, that the said Dutchess and the other person should stand seized of the said Lands unfold, and the Reversion of such part thereof, as should be leased out for lives or years in Trust for *William Lord Beauchamp*, and the Heirs Males of his Body, and for want of such Issue for the benefit of *John Lord Seymour* for life, and after for the benefit; of the first, and every other Son of his Body, and the Heirs Males of their Bodies respectively, and for default of such Issue for the benefit of all his Daughters, and the Plaintiff the Lady *Elizabeth Bruce* his Grandchild, and all the Daughters of *John Lord Seymour* and their Heirs, equally as Tenants in common, and not as Joynt Tenants, which Will the said Duke in 1660 ratified by new publishing thereof, and all the Trustees in the deed of 1652 being dead, except Sir *Orlando Bridgman* and *Gape*, and the interest in Law being in them by Survivorship, Sir *Orlando Bridgman* knowing the debts in the deed of 1652 to be paid, conveyed all the Lands therein mentioned to the said Dutchess of *Sommerfet*.

That in 1671, the said *William Lord Beauchamp* Duke of *Sommerfet* died without Issue, whose Heir the Plaintiff the Lady *Bruce* is, and after the Lord *John Seymour* became Duke of *Sommerfet* and died

died without Issue, by whose death the Plaintiff the Lady *Bruce* is intituled as Heir to Duke *William* her Grandfather, to the reversion in fee of *Mudghill*, Duke *John* being only Tenant in Tail thereof, and ought to enjoy the same, it not being liable to pay any debts, but is discharged thereof by her Grandfathers Will, and not disposed from her by any Act, the 19 100 l. being all paid.

So that the questions now before the Court were, whether the reversion of *Mudghill* expectant upon *Pleydalls* Estate for life, as well as the residue of the Estate be liable to all the debts, which Duke *William* owed at his death, or only to the 19 100 l. debts.

And secondly, Whether the reversion of *Mudghill*, as well as the residue of the Estate, after satisfaction of all the debts of Duke *William*, ought to be for the benefit of all Duke *Williams* Daughters, and the Plaintiff Lady *Bruce* and their Heirs equally, or the said reversion to go intirely to the said Lady *Bruce*, as right Heir to Duke *William*.

As to the first question, the Defendant insisted the said Reversion, as well as the other Estate is liable to all the debts, for that by the deed of 1652. *Mudghill* was conveyed for raising of Money for the payment of 19 100 l. debts, and all other debts that he should owe at the time of his

his death, in which deed it is provided, that after the said debts be paid, he might by any deed, or his last Will, Revoke all or any of the said Trusts, other than as concerning the 19100. debts, yet made no Revocation, other than by his last Will, and therein he Revoked, only those Trusts that were for the benefit of the Lord *Beauchamp*, or the Lady *Elizabeth Seymour* or his own right Heirs, and by the said deed, the Legal Estate in *Mudghill*, is settled in the Trustees and their Heirs, and the Duke had no power to Revoke the uses or Estates, till after the 19100 *l.* was paid, and the said Duke directing his Trustees to convey *Mudghill* to his Son *John*, he did thereby dispose of an equitable interest, only of the reversion of *Mudghill*, and the 19100 *l.* was not paid in the said Dukes life-time, but great part remains unpaid, and he hath contracted several new debts, since the 20th of *April* 1654. which the Defendant since paid upon the Securities of the said Lands, and *Mudghill* is one of the Mannours conveyed by the deed of 1652. for the payment of 19100 *l.* and all other the debts he should owe at the time of his death; and altho' the same be directed by the last Will of the said Duke, to be settled upon the Lord *John Seymour*, and his Heirs Males, yet the said Duke by deed of 1652. had no power to revoke

revoke the same for the payment of his debts, or if he had, he did not revoke the same by the said Will; but left *Mudghill* and other the premisses subject to the payment of his debts; and the Trustees understanding such to be the Dukes intention, never settled *Mudghill* on the said Lord *John Seymour*, who being lately dead without Issue, the same is subjected to the payment of the said Duke *Williams* debts, and when debts are satisfied, the overplus of the Moneys, and the said *Mudghill*, and all other the premisses ought to be divided, according to the intent of the said Dukes Will, and by the said Dukes death, and the Releases of the said Trustees, the interest in Law became vested in Sir *Orlando Bridgman*, and he conveyed *Mudghill*, &c. unto the said Dutches, and the said *Gape* and other the Trustees and their Heirs, that they might therewith pay the said debts; and though there be sufficient besides *Mudghill* to pay all the debts, yet by the Will upon which this question doth arise, that thereby the Trust for the Right Heirs of the said Duke, are revoked in express Terms, so that by any deed preceding the said Will, the Plaintiff the Lady *Bruce* cannot claim any advantage as Heir, the rather, for that by the Will it doth appear, that Duke *William* had an equal regard to his own Daughter, and the Plaintiff the Lady
Bruce

Bruce his Grandchild and Heir, and it cannot be presumed, that he would more concern himself for the Welfare of a Granddaughter, than his own Daughters, nor was the said Reversion of *Mudghill*, disposed to the Plaintiff by any words in the Will, though he did by exprefs words in his Will, Revoke all Trusts, for the benefit of his Heirs in *Mudghill*, as well as the other Lands, and made other particular provisions further, which shews, he did not intend that for her, for if he had, he would not have Revoked the former Trusts, as to that by which she would have been intituled as Heir, especially, when he hath devised all the Surplus of his Estate, which involves *Mudghill* as well as the rest, amongst his own three Daughters, and her equally, nor doth it any where appear, that *Mudghill* is in any sort exempted from Satisfaction of the Creditors, nor could it so be by the said deed made by Sir *Olando Bridgman*, who best knew the intention of all Parties in this matter.

But the Plaintiffs insisted, That the said Duke could not intend *Mudghill* should be conveyed to the uses declared in the Will, for that the same is to be conveyed to the said Lord *John*, and the Heirs Males of his Body, which is an Estate of Inheritance, and he had power by

by a common Recovery to have bound the remainder, and the reversion after the Estate tale is not Affets in Law; and therefore cannot be conceived for the payment of his debts, and the rather, for that he recites deeds in 1652. and April 1654. and directs the Trustees therein, to convey all his Lands and Mannours in those deeds, to his Dutcheffs and others, as to the Mannour of *Mudghill*, as before he declared by his Will; and as to all the rest of the Mannours, he declared for the payment of his Debts, so that (all the rest) excludes the Mannours of *Mudghill*, and upon the whole Will it doth appear, the Duke intended no Reversion should pass, but Reversions after Estates for life or years, and therefore this Reversion of *Mudghill*, which is after an Estate Tail, doth not pass, and if it had been intended to pass, he would have limited it to the said Lord *John* for life, without remainder to his first or other Sons in Tail, for he had before given him a better Estate in *Mudghill* to him and the Heirs of his Body, and the Trustees were not to settle *Mudghill* accordingly, until the same fell in possession, the same being yet for *Pleydalls* life.

This Court on reading the several Deeds and Will, declared, That although the Lord *John*, might possibly have an Estate Tail in him, and doct it; but he not doing it,

Reversion
after an E-
state in Tail
subject to
Trusts for
payment of
debts.

it, this Court can take no notice of it ; though probably he did forbear to do it ; because Duke *William* had Signified his desire, that he should not have an Estate executed to him, till it should fall in possession, and not before, except the Trustees pleased : But the case must be taken, as it doth appear before the Court, that is , *Mudghill* was once liable to the payment of the Debts of Duke *William*, and tho' 'tis pretended that the Will hath taken out *Mudghill*, yet the said Will doth only take out an Estate Tail, but the Reversion thereof, when the same falls in possession, is subject to the same Trust, and goes in company with the other Reversions, and the same is legally conveyed, and doth pass in the general words, and therefore this Court is of Opinion, that the Reversion of *Mudghill*, is part of the unrevo- ked Estate, and that the Lord *Bridgman* did well, when he made the said Convey- ance to the Lady Dutcheſs, and that when the 19100. *l.* and the said other debts are paid, to which *Mudghill* is as well liable, as the other Mannours and Lands, then the Trustees ought to convey all the premisses in *Fourths*, and decreed accord- ingly.

Maddocks

Maddocks contra Wren, 32 Car. 2.
fo. 22.

THe question in this Cause is, with ^{Mortgage!} what profits the Defendant *Wren* ^{Account.} shall be charged in ease of the Plaintiff, who claims the premisses in question, by virtue of a second Mortgage, and is admitted to a Redemption, on payment of what shall appear due to the Defendant *Wren*, who hath the prior Mortgage?

The Plaintiff insists, That the said Mortgage being of a Lease, and the Defendant *Wren* having possession by Attornment of Tenants, he ought to have received the profits, whereby his Mortgage would have been fully satisfied, yet he permitted the other Plaintiff *Dorothy*, Wife of the Plaintiff *Maddox* the Mortgager, to receive the same; and therefore the said *Wren* ought to be charged, whereby the Plaintiff may be let in to have Satisfaction of his Debt.

This Court declared, That the Defendant *Wren* ought to be charged with the ^{The prior Mortgagee} Rent, whether received by the Wife or ^{upon Re-} any other Person, after the Plaintiffs second ^{demption} Mortgage made, but all received by her, ^{by the se-} before the said second Mortgage, he ought ^{cond Mort-} not to be charged. ^{gagee, shall} ^{be charged} with the profits, by whom soever Received after the Second Mortgage.

Coles contra Hancock, 32 Car. 2.
fo. 112.

Revocation
of a Will.

THat *Benjamin Coles* the 11th of June, 1678. made his Will in writing, and thereby gave to and amongst his then Children, naming them, (*viz.*) *Benjamin, Samuel, Mary* and *Hannah*, Portions, and appointed his Real Estate to be Sold, and added to his Personal Estate, and made *Elizabeth* his Wife his Executrix, and the Testator being a Melancholy Person, and fearing he might forfeit his Estate, by making himself away, to prevent a forfeiture, by deed the 14 of June 1678. made over all his Personal Estate to Trustees, first to pay his debts, then to pay some Legacies, and all the rest of his Estate to be divided amongst the aforesaid four Children, That the Testator afterwards died a natural death; but before his death, had another Child, (*viz.*) *Sarah*, who is not provided for, either by the said Will or Deed.

The question is, whether the said Will be Revoked by the said Deed of Trust, that if it be Revoked, then the said *Sarah* insists, to have her share of her Fathers Estate, and that he ought to be looked upon, as dying Intestate, and at least the Personal Estate ought to be distributed by the

the Act for distributing Intestates Estates, and the deed ought not to stand in her way, for that great part of the Estate, did consist in debts, which were made after the said deed, and did not pass to, or was vested in the said Trustees, and that it is against Natural Right and Conscience, that her Father leaving a considerable Estate, she should have nothing of it.

This Court on reading the said Deed and Will, is of opinion, that the said deed of Trust, is no Revocation of the said Will, being not made with intent to revoke the same, but only to prevent the forfeiture, in a case which never happened, and Decreed the same to be set aside, and the Personal Estate to be distributed according to the Will, and the remainder to be divided amongst the four Children, *Benjamin, Samuel, Mary and Hannah*, the same being given to them by Name, and as to the Real Estate, it being ordered by the Testator, to be added to his Personal, for increase of all his Childrens Portions, and the said *Sarah* being born before he died, the same to be Sold and divided amongst the five Children, (*viz.*) *Benjamin, Samuel, Mary, Hannah*, and *Sarah* equally.

A Deed of Trust, no Revocation of a Will

Estate Devise to be sold for increase of his Childrens Portions, and a Child is born since the Will, that Child shall have a share.

*Sale contra Freeland, 32 Car. 2.
fo. 272.*

Will.
Settlement.
Revocation.

THat *Thomas Freeland* the Defendants great Grandfather, being Seized of the premisses, did by his Will in writing, devise the same to *Nicholas* his Son for life only, and afterwards to his Grandson *John*, late Husband of the Defendant *Frances*, and Father of the Defendant *John*, and his Heirs for ever, That the said *Thomas* and *Nicholas* being dead, *John* the Grandson entred, and for 300 *l.* Mortgaged the premisses to the Plaintiff, and not long after the said *John*, on confidence of the power he had to dispose of the premisses, made his Will, and the Defendant *Frances* Executrix, and devised the premisses to be Sold, for payment of his Debts.

But the Defendant insists, That the said *Thomas* the great Grandfather, had no power to dispose of the same premisses, and if he had, he did not pursue it regularly, for that he had made a Settlement of the premisses in 1651. upon one *Henry Weston*, and his Heirs, to the use of him the said *Thomas* for life, and after to *Nicholas* his Son for life, and after to the use of the said *John* his Grandson, and the Heirs of his Body, with remainder over, and that the Defendant *John* the Grandson, by vir-
tue

due of the said deed as Heir in Tail, claims the premisses, whereas (if any such deed were) it was with a power of Revocation by any Writing or Will in writing, to be executed in the presence of three Witnesses, and was revoked by his making his said Will, in the presence of three Witnesses, though one of them then present, did not subscribe the same, That the said *John* the Grandson, had the full power of the Estate, and the grant made to the Plaintiff, ought to be supported in Equity, being for valuable consideration, though the power was not literally pursued in the Circumstances of three Witnesses, the intent of the Person appearing, as sufficiently by two Witnesses, as if there were three, and submit to the Judgment of this Court.

The Plaintiff farther insisting, That the said *Thomas* the great Grandfather, takes notice in the preamble of his Will, of the power by him reserved upon the said Settlement, to make any alteration thereof during his life; and then by the said Will deviseth the premisses to the said *John* his Grandson in Fee, and he Mortgages to the Plaintiff, and there is no Colour, but the Defendants ought to redeem, or be foreclosed.

A Settlement with power of revocation by Will in writing, executed in the presence of three witnesses, but one of them did not subscribe his Name, yet Decreed a sufficient Revocation.

This Court (it appearing that there was more than two Witnesses present at the publishing the Will, though two only Subscribed their Names thereto, and upon hearing the words of the power, and also the Will of the said *Thomas Read*) declared, that as this case was Circumstanced, there ought to be a Redemption or a foreclosure, and that the Will although but two Witnesses to it, did sufficiently revoke the said deed of Intail.

Rose contra Tillier, 33 Car. 2.
fo. 435.

Copyhold Surrendred on Condition to pay 200 l. to Katherine, at 21 years of Age and if she die before 21 without Heirs of her Body, then to the Surrendree. Katherine dies before 21, leaving a Son, Decreed the 200 l. to be paid to the Son, and the Lands to stand charged therewith.

THAT *William Tillier* deceased, 14 Car. 2. Surrendred Copyhold Lands of Inheritance, to the use of the Defendant *J. Tillier* his Heirs and Assigns for ever, upon condition, that the Defendant should pay, or cause to be paid to *Katherine Tillier*, the Daughter of the said *William Tillier* 200 l. when she should accomplish the Age of 21 and if the said *Katherine* should die before 21, without Heirs of her Body, then the said 200 l. to be for the use of the said Defendant; but if default should be made by the said Defendant, then the said Copyhold before 21, leaving a Son, Decreed the 200 l. to be paid to the Son, and the Lands to stand charged therewith.

pyhold

pyhold Lands should be to the use of the said *Catherine*, her Heirs and Assigns, and the said Surrender to be void; and the said *Willian Tillier* after the said Surrender, and before he died, by writing appointed the said Defendant not only to pay the said 200 *l.* to the said *Katherine*, but also 6 *l. per Cent.* till such time as the same became due: That the Plaintiff married the said *Katherine*, and had by her one Son named *George*; that after *Katherine* died, and then *George* and the Plaintiff took Administration to them both, whereby he is intituled to the said 200 *l.* with damages.

The Defendant insists, That *Katherine* died before the Age of 21, and so he is not liable to pay the said 200 *l.* or to give any Account of the Lands or Profits in the Surrender.

This Court decreed the Defendant to pay the Plaintiff the said 200 *l.* and that the said Lands so surrendered stand charged therewith.

Thompson contra Atfield, 33 Car. 2.
fo. 412.

Marriage
Settlement.

THe Bill is to discover a purchase Deed of *Frogpoole*, purchased by *Henry Atfield*, the Plaintiffs Great Grandfather, to him and his Heirs, and that *William Thompson* the Plaintiffs Grandfather, married *Mary* the eldest Daughter of the said *Henry Atfield*; who declared that he had made the purchase aforesaid, for the benefit of the said *William* and *Mary* his Wife, and for the Heirs of the said *Mary*, and that he would settle the same accordingly, but the said *Henry Atfield* dying before any such Deed was executed; yet the said *William* and *Mary* were in possession long before the death of the said *Henry*, and paid no Rent, and the said *Henry* leaving a Son at his death, (*viz*) *John Atfield* the Defendants Father, who having a great affection for *Anthony Thompson* the Plaintiffs Father, who was the Son and only Child of the said *William* and *Mary* his Aunt, a Match was proposed between the said *Anthony* and *Elizabeth Smith* the Plaintiffs Father and Mother, which took effect; but before and in consideration of the said Marriage the said *John Atfield* the Defendants Father settled the said premisses on the said *Anthony*

Anthony the Plaintiffs Father and his Heirs for ever, and the said *Anth.* had by the said *Elizabeth* the Plaintiff his eldest Son and Heir. But the Defendants pretend the said Deed is defective in Law, to have which Deed made good, and supply the defect thereof by Equity by the Defendant, according to the intent of the original Settlement made by *John Atfeild*, the Defendants Father, is the Bill.

The Defendant insists, There could be no such Marriage Agreement for settling the premises as aforesaid, for that *Mary* sued her Mother and had her portion out of the personal Estate, and though the Defendants Father might intend to give the Plaintiffs Father the premises, and sealed a Deed for that purpose; yet he altered his Mind and never perfected it, and there was no Consideration for his so doing.

And the Defendant insists, He ought to enjoy the premises, for that by the Plaintiffs own shewing his Title is defective, and therefore ought not to receive any countenance in a Court of Equity against the Defendant, who is Heir at Law to his Father and Grandfather, and comes in and ought to have the Aid of the Court to protect his Title.

But

Defect of
Livery and
Seizin aided
in *Chancery*.

But the Plaintiffs Council insisted, That the Defendants detaining of the said Deed is a Fraud, and the Consideration of making the said Deed is valuable, and there is no defect therein, but want of Livery and Seizin, which defect this Court hath often supplied, when no Fraud appears in gaining the Deed.

This Court (the said Deed appearing to be fairly executed by the Defendants Father, and that there was no defect therein save only the form of Livery and Seizin, and made on such valuable Consideration as Marriage) decreed the Defendant to execute Livery and Seizin in the said Deed, and make farther assurance of the said premisses to the Plaintiff and his Heirs, and the Plaintiff is decreed to enjoy the same against the Defendant.

*Barker contra Hill, 33 Car. 2.
fo. 278.*

Upon a
Contract
for Copy-
hold Estate,
and pur-
chase Mony
paid, the
Bargainor
dies before
Surrender,

THe Plaintiff having Contracted with the Defendants Father for the purchase of a Copyhold Estate, the Plaintiff paid the purchase Mony, and the Defendants Father agreed to surrender the premisses at next Court, and said, He had made a Surrender lately to the use of his Heir decreed to surrender.

Will

Will, which would enure to the benefit of any Purchaser; but before next Court day, and any Surrender made, the Defendants Father died, so the Bill is to have the Defendant his Son and Heir to confirm the Plaintiffs purchase by Surrender, or otherwise, as this Court shall direct.

This Court decreed the Defendant, when he came of Age to surrender effectually the premisses to the Plaintiff, and the Lord of the Mannor presently to admit the Plaintiff Tenant to the premisses.

*Bonnington contra Walthall, 33 Car.2.
fo. 37.*

THE Defendant *Walthall* claims an Annuity. Annuity of 100 l. per An. and Interest out of the Estate in question ever since August 1642. with Interest, by virtue of a Deed of that date made by himself to Mr. Serjeant *Willmot* and others, whereby it is appointed, that the Trustees in the said Deed should dispose of the Monies by them raised by profits and sale of the premisses, for payment to the said Defendant and his Assigns, during his life and the life of *Peter Bonnington*, the yearly Sum of 100 l. and the said demand of the said 100 l. per Annum and Interest being

being a Matter of great value and moment in the Cause, it is referred to the Judgment of the Court, whether all or how long the said 100 *l. per Annum* shall or ought to be allowed in this point, as also the original Cause which was heard 19 Nov. 1679. coming now to be heard again.

The Plaintiff insisted, That the 100 *l. per Annum*, if it was created, the same determined by the death of *Peter Bonnington*.

But the Defendant *Walthall* insists, to have Allowance for the said Annuity of 100 *l.* and Interest for the same. for 40 years past; whereas the Plaintiff insists, That the 100 *l. per Annum* never was nor ought to be allowed to the Defendant, for that the Deed of *August* 1642. under which the Defendant claims the said 100 *l. per Annum*, the same was to be paid in the first place before debts, and there being a debt due to one *Chambers*, which the said Defendant brought in, against which debt if the said Annuity had been real, the Defendant would have opposed the payment of his said 100 *l. per Annum*, being to be paid in the first place, and the Defendant not demanding the said Annuity in 40 years, and suffering debts to be paid before it, it ought to be adjudged a Trust for *Peter Bonnington*, and the

the rather for that no Consideration appears for such Annuity.

The Defendant insists, That the Plaintiff admits it a Trust, and seeks Relief only for the Surplus after Trusts satisfied and determined, and this Trust being Continuing the same with Arrears and Interest, ought to be paid to the said *Walthall*.

This Court on reading the said Deed, Annuity saw no Consideration for granting the said ^{not being} Annuity, and it never being demanded, demanded this Court conceived it was a Trust for ^{in 40 years} *Bonnington*, and would not charge the ^{time, conceived to be} Estate therewith, and decreed the Estate ^{a Trust.} to be discharged thereof.

Ring contra Hele, 33 Car. 2.
fo. 270.

THe Plaintiffs *Rings* Bill is for the Writings and Estate of Sir *Henry Hele*, which he claims by virtue of an Agreement made by the said Sir *Henry* and him, wherein it was agreed, that the said Sir *Henry* should settle his Lands in *Wigborough*, and *Bridges* in *Com' Sommerfet* on himself for life, after to the Heirs of his Body, with power to make his Wife a Joynture of *Wigborough*, and to grant Estates thereout for three lives, with a Remainder to the Plaintiff *Ring* and the Heirs of his Body

Considera-
tion.

Body if he Survived ; and Sir *Henry* died without Issue, with Remainder to Sir *Henry's* right Heirs , with power to Sir *Henry* to sell *Pooles* Tenement , part of the premisses , and Sir *Henry* was forthwith to suffer a Recovery to dock the In- tail of the premisses, and in consideration thereof, the Plaintiff *Ring* was to settle his Estate in *Dorset* and *Sommerfet*, to the use of himself in Tail, with Remainder in Tail to Sir *Henry Hele* , with Remainder in Fee to the Plaintiff , and that if either party leave Issue, to be at liberty to make new dispositions as he pleased : That Sir *Henry* imployed one *Chubb* and *Patten*, to assist the Plaintiff *Ring* in Surveying Sir *Henry's* Estate, and after both the Plaintiff *Ring* and Sir *Henry* went to Counsel, who advised a Deed of bargain and sale of the said Estate, from Sir *Henry* to the Plaintiff *Ring*, which was executed between the said Sir *Henry* and the Plaintiff *Ring*, and Inrolled , and bears date the 26 of *March* 1673, That before the said Recovery, the Plaintiff *Ring* prepared another Deed dated the 6th of *May* following, to lead the uses thereof according to the said Agreements, and a draught of a Settlement of the Plaintiff *Rings* Estate on Sir *Henry*, both which being perused and approved by Sir *Henry*, were also executed, and the Deed to lead the uses of the Recovery

covery recited the said Agreement and Inrolled Deed to make the Defendant Tenant to the *Precipe*, and Sir *Henry* declared, the said Recovery to be to the uses in the said Agreement, and the Plaintiff *Ring* by his said Deed Covenants with the said Sir *Henry*, to stand seized of the Parsonage, and other Lands in *Teovel* in *Com' Somerset*, and also in *Com' Dorset* being all the Estate he was then seized of in Fee in the said Counties, and settles them to the uses in the said Agreement, ^{Agreement.} That the said Sir *Henry* declared himself well satisfied with what he had done, and paid the charges of the Writings: That the Plaintiff *Ring* two years after had Issue Male, and Sir *Henry* after married and died without Issue, and without making any Joynture, or suffering any other Recovery, and doing any other act but selling the Inheritance of one Farm, so the premisses came to the Plaintiff *Ring* who entred, but the Defendant *Hele* the only Son of *Richard Hele*, who was Uncle of the said Sir *Henry*, wrought on Sir *Henry* to make a Will, and to Devise the Estate to the Defendant *Hele* and his Heirs, which Devise the said Sir *Henry* would not make.

The Defendant insists, That the Settlements on the Plaintiff *Ring* were Forged, and that the said *Ring* never made any
Settle-

Settlement of his Estate on the said Sir *Henry*, or if he did, that nothing passed thereby but only by way of Covenant to stand seised, and that if the Plaintiff *Ring* hath got any such Deed to lead the uses of the said Recovery, he got it by Fraud, and that if there was such a Deed of *May* 1673, which was after the Recovery to declare the uses thereof, it would not alter that of the 26 of *March*, for that the Plaintiff is a Stranger in Blood to the said Sir *Henry*, and it doth not appear, that any Inrolment or due Execution was made of the Plaintiffs *Rings* Settlement, so that the pretended Deeds on both sides are void, and not to be supported in a Court of Equity; but the Plaintiff *Ring* may bring an Action at Law where it is proper to be tryed, and where the Defendant having a good Title under the Will of Sir *Henry*, will make his defence.

The Plaintiff insisted, That the Defendant objected two matters against the Plaintiff *Rings* demands, (*viz.*) Forgery and Fraud, and if he will insist on the Fraud, he must admit the Deeds to be executed, and the Defendant admitting *de bene esse*, the Deeds to be executed, and to insist only on the Fraud and Circumvention.

This

This Court inspecting the said Deeds declared, there was great suspicion of the reality of the said Deeds, but taking into consideration the inequality of the said Estates in the value, though not material in this case, yet it was a strong presumption, that the said Sir *Henry Hele* did not knowingly leap into such a bargain, and then the inequality of assurances is as bad, the said Sir *Henry Heles* Settlement on *Ring* being a legal Estate, and mentioned to be in consideration, that *Ring* had made a good Settlement of his Estate which he had not, the same being void in Law, and not to be made good by Equity, and the subsequent inconsistent Acts of offering the Estate to be sold, and *Rings* negotiating the affair were above all the rest bad and apparent Badges of Fraud and Circumvention in *Ring*, in obtaining the said Deeds from the said Sir *Henry Hele*, and it is remarkable in the Case, that Sir *Henry* by his Will, devised his Estate to the Defendant *Hele* a little before his death.

Badges of Fraud.

This Court therefore dismissed the matter of *Rings* Bill, but upon *Heles* Bill decreed the Agreement of *April*, and the two Deeds of *May* 1673, obtained by the said *Ring* from Sir *Henry*, be for ever hereafter damned and set aside, and *Ring* to reassure to the Defendant *Hele*,
Q and

and a perpetual Injunction, not only to stay all Suits at Law touching the premisses, but also for quieting the said *Hele* in the Possession.

Com' *Craven & al'* contra *Knight & al'*
34 Car.2. fo. 732.

Bankrupts
as to part-
ners.

THE Bill is that the Defendant *Geo: Widdows* being indebted to the Plaintiffs, became bound to them in several Bonds, and the said *Widdows* and the Defendant *Berman*, for several years past were Copartners, and *Widdows* by Articles of Copartnership, was intituled to two thirds of the whole Stock, and the Defendant *Berman* to one third: That the said *Widdows* and *Berman* the 25 of *August* last became Bankrupts, and a Commission of Bankruptcy awarded against them, the Commissioners of Bankrupts assigned all the Estate of the said Bankrupts, to the Defendant *Wright* and others, and refuse to let the Plaintiffs Credirors of Bankrupts to come in, and intend to divide the said Estate amongst the Joynt Credirors of Bankrupts, by reason whereof the Plaintiffs debts will be utterly lost.

Joynt debts
to be paid
out of the
Joynt Stock.

The Defendants insist, it was agreed by Indenture of Copartnership, that all such debts as should be owing on the joynt account, should be paid out of the Joynt Stocks,

Stocks, and at the end of the Partnership each Copartner take and receive to his own use, his share of Joynt Stock, and the Joynt Stock and Trade should not be charged with the private or particular debts of either of the said Partners ; but that each should pay their private debts out of their particular Estate, not included in the said Joynt Stock, that if both the said Partners should be living at the end of the first three years of the six years , that the said *Berman* should come in Joynt-Partner accordingly, and during the Joynt Trade, the said Copartners became Joyntly indebted to the other Defendants *Wright*, &c. in 6000 l. and that *Widdows* became indebted to the Plaintiff as afore-
said, without the consent of *Berman*, and the Moneys due on the said Bonds was not brought into the account of that Joynt Stock, and the said *Widdows* was only a Surety, and received none of the Moneys ; and the Defendants insist, that the Joynt Creditors ought to be first paid out of the Estate in Partnership, and that the Commissioners have no power to grant the Joynt Estate to pay the Plaintiffs, they being separate Creditors of *Widdows*, and if a Surplus of the Joynt Estate after the Joynt Creditors be paid, then the Plaintiffs can have but a Joynt Moiety of such Surplus towards their Satisfaction, the said

Separate
Creditors.

Bermans Moiety being not liable to pay the said *Widdows* separate debts, and the debts then claimed, were the proper debts of the said *Widdows*, and that after all the Joynt debts are paid, there will be an Overplus, so that thereby the said *Berman* will be discharged, and have Money paid to him; but if the Plaintiffs and other separate Creditors of *Widdows* be admitted to the Joynt Estate, there will not be sufficient to pay the Joynt Creditors, so thereby not only *Bermans* Estate will be applyed to pay *Widdows* debts, but will be liable to the Joynt Creditors; That there can be no division of the Joynt Estate, whereby to charge any part thereof with the private debts of either party, and till the Joynt debts are paid, and till division be made of the Surplus, both parties are alike interessed, and every part of the said Joynt Estate; that the Commissioners have no power by the Commission, to Administer an Oath to the Plaintiffs, for proof of their debts, they claiming debts from the said *Widdows* only, and the Commission is against *Widdows* and *Berman* Joyntly, and not severally, and therefore cannot admit of the Plaintiffs Creditors.

This Court declared, That the Estate belonging to the Joynt Trade, as also the debts due from the same, ought to be divided into Moieties, and that each Moiety
of

of the Estate ought to be charged in the first place, with a Moiety of the said Joint debts, and if there be enough to pay all the debts belonging to the Joynt Trade, with an Overplus, then such Overplus ought to be applied to pay particular debts of each Partner; but if sufficient shall not appear to pay all the Joynt debts, and if either of the Partners shall pay more than a Moiety of the Joynt debts, then such Partner is to come in before the said Commissioners, and be admitted as a Creditor for what he shall so pay over and above his Moiety, and decreed accordingly.

Charles Howard contra le Duke de Norfolk & al, 34 Car. 2. fo. 722.

THe Plaintiff by his Bill seeks to have Execution of a Trust of a Term of 200 years of the Barony of *Grostock*, The Case was this.

The Earl of *Arundel* (the Duke of *Norfolk*'s Father) by Lease and Release, Anno 1647. settled the Barony of *G.* and other Lands to himself for life, then to the Countess *Elizabeth* his Wife for life, and after her decease, there is a Term limited to the Lord *Dorchester*, and other Trustees for 200 years, under a Trust to be declared in a deed of the same date, with the

Perpetuities,
or Entailing
a Term for
years with
Remainders
over.

Release; and the Limitation of the Inheritance, after the Term of 200 years, is first to *Henry Howard*, now Duke of *Norfolk*, and the Heirs Males of his Body, then to Mr. *Charles Howard*, the now Plaintiff (Brother of the said *Henry*) and so to all his Brothers Successively in Tail Male remainder over. Then by the said other Deed, the Earl declares the Trust of the Term of 200 years, and that deed in the reciting part declares, that it was intended the said Term should attend the Inheritance and the profits should go to such persons, and in such manner as was therein after limited (viz.) to *Henry Howard* now Duke of *Norfolk*, and the Heirs Males of his Body, so long as Lord *Thomas*, Lord *Maltrevers* Eldest Son of the said Earl of *Arundell* or any Issue Male of his Body should be living; but in case he should die without Issue Male in the lifetime of *Henry Howard*, not leaving his Wife *enseint* with a Son, or in case after the death of *Thomas*, without Issue Male, the Honour of the Earldom of *Arundel* should descend to *Henry Howard*, then *Henry Howard* and his Heirs to be excluded of the Trust, and then it should be to (*Charles* the Plaintiff) and the Heirs Males of his Body, remainder in like manner to other Brothers. After this, the Contingency doth happen, for *Thomas Duke of Norfolk* dies without

without Issue, and the Earldom of *Arun-*
del, as well as the Dukedom of *Norfolk*,
descended to *Henry* now Duke of *Nor-*
folk, by *Thomas* his death without Issue,
presently upon this, the Marquess of *Dor-*
chester the Surviving Trustee, Assigns the
Term to one *Marriott*, he Assigns it to
the now Duke of *Norfolk*, and the Duke
suffers a Recovery, to the use of him and
his Heirs, and the Plaintiffs Bill is to have
execution of the Trust of this Term, to
the use of himself and his Heirs Males of
his Body.

The Defendants insist, That by the As-
signment by *Marriott*, to my Lord Duke
Henry, the Term was Surrendred, and
quite gone, that the Common Recovery
which barded the remainders, which the
other Brothers had, would also be a Bar
to the Trust of this Term, and that the
trust of a Term to *Henry* and the Heirs
Males of his Body, until by the death of
Thomas without Issue, the Earldom should
descend upon him, and after that, to *Charles*
and the Heirs Males of his Body, was a
void Limitation of the remainder to
Charles.

The Plaintiff insists, Though the Term
by the Survivor is gone, and Merged in
the Inheritance, yet the Trust of that
Term remains in Equity; That this is not
a Term that attends the Inheritance, but

its a Term in gross, and so not barred by the Recovery, and that the Limitation of the remainder in Contingency, is good in Law, and Relief ought to be had in this Court.

The Lord Chancellor *Nottingham* (the Case being of great Consequence) calls the Judges to his Assistance, (viz.) the Lord Chief Justice *Pemberton*, the Lord Chief Justice *North*, and the Lord Chief Baron *Mountague*, and they made one single point in the case.

Whether this Contingent Trust of a Term limited to the Plaintiff *Charles*, and the Heirs of his Body, upon the dying of *Thomas* without Issue Male, whereby the Honour did descend to *Henry*, be good in point of Creation and Limitation; for as for the Recovery, if this be not a good Limitation in point of Creation, the Recovery will do nothing, so that supposeth it to go along with the Inheritance, and if this take effect, then it will suffer no prejudice by the Recovery : And as for the Assignment by *Marriott* to the Duke, if this Court decree it for the Plaintiff, then it is a Breach of Trust, and then he must answer for it, and so must the Duke, for it is a Surrender to a person, who had notice of the Trust: If for the Defendant, then it is of no weight. So that the whole rests upon the first single point (viz.) whether it

it be a good Limitation upon the Contin-
gency to *Charles*, or as they call it, a Spring-
ing Trust. Springing
Trust.

And the said three Judges were all of
Opinion, that it was a void Limitation,
and that it ought to be Decreed for the
Defendant.

They said, there is great difference as Term in
to the Limitation of Terms that are in gross, and a
gross, and Terms that attend the Inheri-
tance, as to Terms in Gross, they are not
capable of Limitation to one, after the
death of another, without Issue; but in
Terms attendant upon an Inheritance, there
may be such a Limitation, if the Inheri-
tance be so limited, and not else: Now
the Term is capable of a Limitation to
Henry, and the Heirs Males of his Body,
and for want of such Issue to *Charles*, and
the Heirs Males of his Body; because it
hath an Inheritance to support it: But now
to put another limitation upon it, that upon
the dying of *Thomas* without Issue, whereby
the Earldom shall descend, this shall go
over to *Charles*, that cannot be, for it
hath no Freehold to support it, and so its
a Term in gross; further, there cannot
by the Rules of Law or Equity, be a Re-
mainder for years, of a Term limited af-
ter an Estate Tail, neither directly, nor
upon Contingency; as in *Burges's Case*,
but the Law will allow a remainder di-
rectly

rectly upon an Estate for life; so likewise upon a Contingency, if that were to happen during the Continuance of the particular Estate: But this case is a step further, and not to be allowed; they relied chiefly upon *Child* and *Bayles Case*, which was put thus by Chief Baron *Mountague*, a Devise by *A.* of a Term to *William* his Eldest Son, and his Assigns, and if he die without Issue, then to *Thomas* his youngest Son. It was Judged in the *Exchequer Chamber*, to be a void remainder, because thereby a perpetuity would ensue, though it was argued in that case, that it was given upon a Contingency to the younger Son, which would soon be Determined, and end in a short time. Chief Baron *Mountague* put this for Law, a Term may be limited to one, and the Heirs Males of his Body, upon a Contingency to happen first with Limitation over, if that Contingency do not happen, it is a good Limitation, as if a Term be limited to the Wife for Life, and then to the Eldest Son, if he over-live his Mother, and the Heirs Males of his Body, the remainder over to a younger Son, if the Eldest Son dye in the life of the Mother, the Limitation to the second Son may be good, but if there be an Instant Estate Tail created of a Term, tho there be a Contingency as to the expectation of him in remainder,

der, yet this is such a Total Disposition of a Term, as after which, no Limitation of a Term can be; and so the Judges were of Opinion, that the Plaintiff had no Right to the Term, but the decree ought to be for the Defendant.

The Lord Chancellor *Nottingham* differed from the Judges, and Decreed for the Plaintiff. He put some steps or Preliminaries, which he agreed with them, and which were clear.

1. That the Term in question, though it were attendant on the Inheritance at first, yet upon the hapning of the Contingency, its become a Term in gross.

2. That the Trust of a Term in gross, can be limited no otherwise in Equity, than the Estate of a Term in gross can be limited in Law.

3. The legal Estate of a Term for years, whether it be a long or a short Term, cannot be limited to any Man in Tail, with the remainder over to another after his death without Issue, this is a direct perpetuity.

4. If a Term be limited to a Man and his Issue, and if that Issue die without Issue, the remainder over, the Issue of that Issue takes no Estate, and yet because the remainder over cannot take place till the Issue of that Issue fail, that remainder is void too.
Reeves Case.

5. If

5. If a Term be limited to a Man for his life, and after to his First, Second, and Third Son in Tail Successively, and for default of such Issue the remainder over, though the Contingency never happen, yet the remainder is void, though there were never a Son born to him; that looks like a perpetuity, *Sir William Buckhursts Case*.

6. One Case more, and that is *Burgesss Case*; A Term is limited to one for life, with Contingent remainders to his Sons in Tail, with remainder over to his Daughter, though he had no Son, yet because it was foreign and distant, to expect a remainder after the death of a Son, to be born without Issue, that having a prospect of a perpetuity, was adjudged void.

7. If a Term be Devised, or Trust of a Term limited to one for life, with twenty remainders for life Successively, and all the Persons in *Esse* at the time of such limitation, these are all good remainders.

8. A Term is Devised to one for 18. years, after to C. his Eldest Son for life, and then to the Eldest Issue Male of C. for life, though C. had not any Issue Male at the time of the Devise, or death of the Devisor, but before the death of C. its good, being a Contingency that would speedily be worn out. *Cotton and Heaths Case*; for there

there may be a Possibility upon a Possibility, and a Contingency upon a Contingency, and in truth every Executory devise is so; and therefore the contrary Rule given by Lord *Popham*, in the *Rector of Chedingtons Case*, is not Reason.

These things were agreed by all.

But the Point is: The Trust of a term for 200 years is limited to *Henry* in Tail, provided if *Thomas* die without Issue in the life of *Henry*, so that the Earldom shall descend upon *Henry*, then to go to *Charles* in Tail, and whether this be a Limitation to *Charles* in Tail is the Question.

My Lord Chancellor conceived it a good Limitation as a springing Trust, to arise upon a Contingency, and which is not of a remote or long Consideration.

As for the Legal Reasons of this Opinion, they were these:

1. Many Men have no Estates, but what consist in Leases for years. Now it would be absurd to say, That he who has no other Estate than what consists in Leases for years, should be incapable to provide for the Contingencies of his own Family, though they are directly in his immediate prospect, he shall not make provisions for Wife and Children upon Marriage.

2. It was the Opinion of the Lord Chief Justice *Pemberton*, That had it been thus Penned it had been good. If *Thomas* die without Issue Male, living *Henry*, so that the Earldom descend upon *Henry*, then the 200 years limited to him and his Issue shall cease; but then a new Term of 200 years shall arise and be limited to the same Trustees, for the benefit of *Charles* in Tail. Now what difference is there, why a man may not raise a new springing Trust upon the same Term, as well as a new springing Term upon the same Trust? It is true, in 6 *Ed. 6.* in the time of Lord Chancellor *Rich* all the Judges delivered their Opinion; If a Term of years be devised to one, provided if Devisee die, living *I. S.* then to go to *I. S.* is absolutely void. But in 19 *Eliz. Dier* fo. 277, 328. it was held by the Judges to be a good Remainder, and that was the first time that an Executory Remainder of a Term was held to be good. As for *Child* and *Bayles* Case, the Case is truly Reported by *Crook*; A Term of 70 years is devised to *Dorothy* for life, then to *William* and his Assigns all the rest of the Term, provided that if *William* die without Issue living at the time of his death, then to *Thomas*, which is in effect the present Case; but there was more in it; *William* had the whole Term

Executory
Remainder.

Term to him and his Assigns. *Dorothy* was Executrix, and granted the Lease to *William*: And the Record goes further, *After the death of Thomas without Issue, it was to go the Daughter*, which was a plain affectation of a Perpetuity; but however this Case is contradicted by other Resolutions. *Cotton* and *Heath* before cited, and *Wood* and *Sanders* in this Court, which was this; a long Lease is limited and declared thus: To the Father for 60 years, if he lived so long, then to the Mother for 60 years if she lived so long, then to *John* and his Executors if he survived his Father and Mother, and if he died in their life time, having Issue, then to his Issue; but if he die without Issue, living the Father or Mother, then the Remainder to *Edward* in Tail; *John* died without Issue in the life time of the Father and Mother: It was Resolved by Lord Keeper *Bridgman*, assisted by two Judges, That the Remainder to *Edward* was good: The whole Term had vested in *John*, if he had survived; yet the Contingency never happening, and so wearing out in the compass of two Lives in being, the Remainder over to *Edward* might well be limited upon it.

Object.

Obiect. Where will you stop, if not at *Child and Bayles Case*?

Resp. Every where, where there is apparent danger of a Perpetuity; but so is not this Case.

The Equitable Reasons were:

1. It was Prudence in the Earl to take care, that when the Honour descended upon *Henry*, a little better support should be given to *Charles*, who was the next Man, and trod upon the Heels of the Inheritance.

2. It was very probable and almost morally certain that *Thomas* would die without Issue, he being not of a good state of Body or Mind, and while such they were circumspect that he should not Marry.

3. Its an hard thing for a Son to tell his Father, That the provision he has made for his younger Brothers is Void in Law: But it is much harder for him to tell him so in *Chancery*, for there no Conveyance is ever to be set aside, where it can be supported by a reasonable Construction. The Law doth in many Cases allow of a future Contingent Estate to be Limited, where it will not allow a present Remainder to be Limited: A man hath an Estate Limited to him his Heirs and Assigns (this is a Fee-simple;) but if he die without Issue, living *I.S.* or in such a short time to *I. D.* this is good.

good. Though it be impossible to limit a Remainder of a Fee upon a Fee, yet its not impossible to limit a Contingent Fee upon a Fee. *Pell and Brawnes Case*, If a Lease comes to be limited in Tail, the Law allows not a present Remainder to be limited thereupon; yet it will allow a future Estate arising upon a Contingency only, and that to wear out in a short time. The Limitation in *Wood and Sanders Case* is after an express Entail, and yet Adjudged good, because it was a Remainder upon a Contingency that was to happen during two Lives, which was but a short Contingency, and the Law might very well expect the hapning of it: But our Case is stronger, because it is only during one life.

It was decreed the Plaintiff should enjoy this Barony for the residue of the Term, and the Defendants to make him a Conveyance accordingly, and to account with the Plaintiff for the Profits received since the death of Duke *Thomas*, and which they or any of them might have received without wilful default.

The Duke of *Norfolk* exhibited a Bill of Review in *Chancery*, to which *Charles Howard* put in a Plea and Demurrer, which was Argued before Lord Keeper *North*, and he Over-ruled the said Plea and Demurrer, and Reversd the Lord Chancellors Decree.

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Bur

But afterwards this Decree was Revers'd in Parliament, and the first Decree affirmed in behalf of *Charles Howard*.

Turner contra Crane, 34 Car. 2.
fo. 668.

Copyhold
Mortgage.

Admittance
of Guardian.

That *Robert Newell* and his Wife, for 220 *l.* paid by the Plaintiffs Wife *Susan*, then a Widow, did Surrender the Copyhold Premises to the use of the said *Susan* and her Heirs, on condition that the said *Robert Newell* and his Wife's paying to the said *Susan*, her Executors and Assigns 230 *l.* in *March* next, after, then the Mortgage to be void, and the Mony not being paid, the said *Susan* was admitted to the premises, and afterwards Married the Plaintiff, and they received the profits of the premises; and afterwards *Susan* died Intestate, no ways indebted, leaving *Susan* her Daughter by the Plaintiff, her Heir an Infant, and the said *Susan* the Infant was admitted by the Plaintiff her Guardian, as Heir to *Susan* the Mother, who received the profits, and died, leaving the Defendant *Jane Crane* her Aunt as Heir, and she was admitted, and the Plaintiff on *Susan* the Daughters death, took Administration of *Susan* the Mothers Estate, and claims the Mortgaged Lands, insisting, That though the Defendant *Jane* was

was Heir to *Susan* the Daughter, who was Heir to *Susan* the Mother, yet the premisses being a Mortgage, belonged to him as Administrator to *Susan* the Mother.

This Court would consider of this Case, and of Cases of Mortgages in Fee, where no Covenant is made for the payment of the Mortgage-Mony to the Executor or Administrator, and no debts owing by the Mortgagee, whether the Heir or Administrator of the Mortgagee shall have the Lands.

This Court upon reading Presidents The Heir of declared, That he was fully satisfied that the Mortgagee in Fee the Plaintiff as Administrator to the said *Susan* ought not to have the mortgaged premisses from the Defendant *Jane Crane*, (there being no debts owing) shall the Heir of the Heir of the said Mortgagee, have the but the said *Jane* ought to enjoy the same, Redemption and dismiss the Plaintiffs Bill. Mony, and not the Administrator.

Dowse contra Percivall, 34 Car. 2. fo. 186.

THe Plaintiffs Father, *John Dowse*, took Lessee purchased the a Lease of the City, and afterwards Inheritance purchased the Inheritance in Trustees Names, for him and his Heirs, and the said in Trustees Names, and *Dowse* died Intestate, the Defendant his dies Intestate: This Wife (as Administratrix) claims this Lease state: This to belong to his personal Estate. Lease shall attend the Inheritance.

R 2

This

This Court decreed it, to attend the Inheritance.

Magistr', &c. Universit' Colleg' in Oxon'
contra Foxcroft, 34 Car. 2.
fo. 522.

THe Bill is to Revive a former Decree, made against the Defendants Father, whereby the said Defendants Father was decreed to pay the Plaintiff 2000 *l.* and Interest.

A Decree
 and Seque-
 stration
 against one,
 who dies,
 this shall
 not be Re-
 vived a-
 gainst his
 Heir or
 Real Estate,
 though it
 were for
 Mony pay-
 able on the
 behalf of
 a Charity.

To which the Defendant demurs, for that the said Defendants Father against whom the said Decree and a Sequestration is had is dead, whereupon the Sequestration being granted purely for his Contempt of a Decree, which was for a personal duty only, and determined by his death, and therefore ought not to be Revived against the Defendant his Heirs, nor is his Real Estate in the hands of his Heir chargeable with the Personal duty, or Decree for a Personal duty.

The Plaintiff insisted, This is a Case of Extremity, being on the behalf of a Charity, and the Defendant endeavours to deprive the Plaintiff of 2000 *l.* given for the purchasing a 100 *l.* *per Annum*, for Maintenance of two Fellows of a Colledge.

His

His Lordship declared, That the Decree being for a personal Duty, ought not to be revived against the Defendant as Heir, and allowed the Demurrer, and dismiss the Bill.

Domina Dacres contra Chute, 34 Car. 2.
fo.86r.

THe matter controverted is touching Costs, the Plaintiff had a Decree against the Defendants Father deceased, and that the Plaintiff should have her Costs of that Suit, and the said Cost being taxed, they became part of that Decree, as much as if they had been named in the Decree in certainty.

Costs.

The Defendant insisted, That upon the first hearing Costs were only reserved till after Report, and upon hearing Exceptions to that Report, nothing was said touching Costs, but in the Order of confirming the last Report in that Cause, Costs are directed to be taxed, but the Defendants Father by name was to pay them, and by the Decree as it is inrolled, the Reversion of the Lands in question, was directed to stand charged with the Debts and Damages, but not with the Costs, and the Costs were given as a personal thing, and died with the Defendants said Father, and cannot affect the said Estate

which was the Grandfathers , and the Plaintiff could not have revived her Suit for the Costs alone.

A Suit cannot be revived for Costs alone where no duty is decreed.

This Court declared, That tho' it may be true, that a Suit cannot be revived for Costs alone, where there is no duty decreed , because it is the Latches of the party, not to get them taxed where there is nothing else in demand : Yet when there is a duty decreed , and Costs awarded by the same Decree, which is signed and inrolled in the life of the party, it would be unreasonable, that by the Defendants delaying the Account the Costs should be lost, which could not properly be taxed till the final Decree, and when the charge of Suit is at an end : And this Court further declared , That the Costs when taxed may be recovered out of the Assets, as in the Case of Heirs and Executors at the Common Law, and this Court looks upon the wording of the Decree in that manner , to proceed from the difference between the Debt and Costs, the Debt not being chargeable upon the person at all, and the Costs chargeable upon the person as well as the Assets, and it were unjust to expound the Decree, by charging the person to discharge the Assets from payment of Costs, to which they are naturally chargeable, unless they have been paid by the Defendants Father.

This

This Court therefore thought fit, that the Costs from the time that they were taxed should carry Interest, and charge the Assets by discent, and ordered the Account to be taken by the Master accordingly.

Windham contra Jennings, 34 Car. 2. fo. 776.

Costs from their time of being Taxed to carry Interest, and shall charge and be recovered out of the Assets.

THAT Sir George Crook Mortgaged Lands in 28 Car. 2. to the Defendant for 2000 l. and died, and the Plaintiff being his Heir prays a Redemption.

But the Defendant insists, That the said Sir George Crook before the Mortgage borrowed of the Defendant 300 l. on Bond, (*viz.*) in 1672, and the Defendant insists, it was agreed to be secured also by the said Mortgage, but the Plaintiff is not willing to pay that; only will redeem the Mortgage.

This Court decreed, the Plaintiff to pay to the Defendant both the 2000 l. and the 300 l. and then the Plaintiff to redeem.

Mortgage for 2000 l. before which time the Mortgagor borrowed of him that was after the Mortgagee 300 l. which was agreed to be secured by the said Mortgage, both sums must be paid upon the Redemption.

*Noell & al' contra Robinson, 34 Car. 2.
fo. 168 & 178.*

Bill to answer to De-
visees.

THe Case being (*viz.*) That Sir *Martin Noel* deceased Father of the Plaintiff, being seised, in Fee of a moyety of a Plantation in the *Barbados*, called *Horn hall* with the appurtenances, and being legally intituled by the Laws and Customs of the said Island, to dispose thereof, by his Will in writing, devised the same unto the Plaintiffs *Nathaniel, Grace, Elizabeth* and one *Theodorus Noel*, and Sir *Martin* by his Will appointed the Defendant *Robinson* to supply the said Plantation with all necessaries during the Minorities of the Plaintiffs, and to receive the profits in trust for the Plaintiffs, and for his care therein gives him an allowance and made his Son *Martin Noel* and *Theodorus Noel* deceased, and the Defendant *Robinson* his Executors, and the Defendant *Robinson* proved the Will, and took on him the Execution thereof, and management of the Plantation, and assented to the Legacy and Bequests of the Plaintiffs, and in performance of such Trust and Assent leased the premisses to one *John Worsam* for 20 years, at 20000 *l.* weight of Sugars Rent *per Annum*, in the Trust for the Plaintiffs the Devisees, and since have conveyed away

away the same to one *Falkner* and others to defeat the Plaintiffs, so the Bill is to call the Defendant *Robinson* and *Falkner* to Account for the profits of the premisses, and to convey their Interest to the Plaintiffs.

The Defendants insists, That by the Custom of the said Island of *Barbado's*, where the said premisses are, the said Sir *Martin* had not power to make such Devise of the premisses to the Plaintiffs, he being then much indebted to several persons, and the said Defendant *Robinson* had paid several debts for him; and insists, That the said Lease made to *Worsam*, was done without due consideration, and not with any intent thereby to assent to the Legacy to the Plaintiffs, and deprive the Creditors of their just debts, or in any sort to exempt the Estate there from, nor had no reason so to do, he being bound with the Testator, in several Securities to several persons in several sums of Money, and imployed all the profits he received, as also 500 and odd pounds for *Worsams* Lease, for the payment of Sir *Martins* debts, amounting to 30000 *l.* and so the Testators Estate ought to pay debts, and not to be subject to his Will, and the said Defendant believing the premisses to be as Lands of Inheritance, made the said Lease to *Worsam* a Creditor of Sir *Martins*, but is since advised it is

is a Chattel, and lyable to the payment of his debts.

What Act
amounts to
an Assent of
a Legacy.

But the Plaintiffs insisted, That by the said Lease to *Worsam*, and reservation of the Rent thereon to himself in Trust for the Plaintiffs, he had placed the Estate in such manner, that the same could never by any subsequent Act come into the Administration of the Estate of Sir *Martin*, and that every Act of the Defendant *Robinson* was a plain Assent to the Legacy to the Plaintiffs, and it is plain, the premises were devisable, and so the Plaintiffs Title plain and undoubted, and the Plaintiffs ought to have a Decree against the Defendant, to Account to them for the said Estate, and ought to have the benefit of the said Lease.

The Defendant further insisted, That by such imprudent Act as aforesaid, he ought not to be Devested of the Estate, but it ought to go to pay Sir *Martins* debts.

Devise of a
Plantation
in *Barbados*.

This Court declared, That by the said Clause in the Lease to *Worsam*, the Defendant had Assented to the Plaintiffs Legacies, given them by the Will of their Father, and that the Devise by the Will was a good Devise, and that the premises did well pass thereby; and that the said Act of the Defendant *Robinson* being voluntary, had put the Estate out of the power

power of the Creditors of Sir *Martin*, or out of the power of any Administrator, *de bonis non* of him, and decreed the Plaintiffs to have the benefit of the premisses, and of the Lease to *Worsam*, and the Defendants to Assign their Interests to the Plaintiffs accordingly.

Decree the Plaintiffs to have the benefit, and the Defendants to assign.

But the said Defendant desiring a rehearing of the Cause, which was on the 20th of Nov. 1682. when the Defendant insisted, That the said Lease could not be an Assent, for that the Defendant *Robinson* then claimed the premisses, not as Executor, or otherwise than only as Trustee for the Devisees, whose Inheritance he then took the same to be, and not as personal Estate, upon which and other grounds the Defendant insists, the said Rent and Reversion of the premisses, expectant on the Determination of the Lease was, and ought to be of the Testators personal Estate, and to go in the ordinary course of Administration, and to an Administrator *de bonis non*, and be lyable to debts.

His Lordship notwithstanding what was now urged by the Defendant declared, he saw no cause to alter the former Decree, but confirmed the same.

This

The Decree
reversed by
North.

This Decree reversed by the Lord Keeper *North*, and in 1683, fo. 168. he heard this Cause upon the whole merits, and ordered an Account.

Finch, his
Decree con-
firmed by
Jefferys.

And in 1686, The Lord Chancellor *Jefferys* reheard this Cause upon the Merits. and confirmed my Lord Chancellor *Finch*'s Decree, and discharged my Lord *North*'s Decree.

Benson contra Bellasis, 34 Car. 2.
fo. 848.

THIS Cause having received a hearing before the Lord Chancellor *Nottingham*, 11 July. 33 Car. 2. who made a Decree for excluding the Defendant Dame *Dorothy*, Administratrix of *Robert Benson* the Plaintiffs Father, from having any part of his personal Estate, and the said Cause being heard 10 July, 35 Car. 2. before the Lord Keeper *North*, who decreed the said Defendant Dame *Dorothy*, to retain to her own use one third part of the said personal Estate of the said *Robert Benson*, and the said Cause being again reheard this day by the Lord Chancellor *Jefferys*.

The Case being, that the said *Robert Benson* on his Marriage with the Defendant Dame *Dorothy*, for the settling of a Joynture on the said *Dorothy*, in full of
all

all Joyntures, Dowers and Thirds, which she might claim out of his real and personal Estate, conveyed Lands to the use of himself for life, and after to the said *Dorothy* for life in full of all Joynturs, &c. as is aforesaid, with this Proviso, That if Settlement on Marriage the said *Dorothy*, should after the death of the said *Robert Benson*, have or claim to have, or should recover any other part of the Lands or Tenements, or any part of the personal Estate of the said *Robert*, by the Custom of the Province of *Tork*, or by any other means whatever, other than what the said *Robert Benson* should give, Bequeath or Settle upon or to her; That then the Feoffees therein named should be seised, of all the premisses settled in use upon the said *Dorothy*, to the use of Sir *Henry Thompson* and Mr. *Grayham*, their Executors, Administrators and Assigns for 60 years, to commence from the death of the said *Robert*, if the said *Dorothy* should so long live; Upon Special Trust, that the said *Thomson* and *Grayham* should receive the profits of the premisses limited in the Joynture, and they should dispose thereof to such persons and their uses, as should be damnified by the said *Dorothys* perception, of the profits of any other Lands of the said *Robert*, or the taking or recovery of any part of the personal Estate, other than what should

should be given or bequeathed until the respective values of the Profits, or values of such Personal Estate should be fully satisfied, and the residue of the said Profits to remain to the said *Dorothy*.

That the said *Robert* dying intestate, and the said *Dorothy* Administring at *Tork*, and in the *Prerogative Court of Canterbury*, as Guardian to the Plaintiff *Robert*, possessed the Real and Personal Estate, pretends a Right to some part of the Personal Estate by the said Administration, notwithstanding the said Marriage agreement.

Marriage Agreement provided, if the Wife claim any of the personal Estate by the Custom of the Province of *Tork*, then the Estate to other use. Decreed, she is bound by the said Settlement, and ought not to claim any part of the personal Estate; by *Finch*.

The Lord Chancellor *Nottingham* declared, the said *Dorothy* was bound by the said Marriage Agreement, and the Administration ought to have been granted to her, and that however, the same ought not any ways to avail her, for that it would be contrary to the said Settlement and Agreement, and that the said *Dorothy* ought not to claim any part of the Real Estate, other than what was Setled on her by the said deed, or any of the Personal Estate, and decreed accordingly.

Reversed by *North*. But the Defendant *Dorothy* insisted, That the Lord Keeper *North* had adjudged one third of the Personal Estate, to belong

belong to the Defendant, by virtue of the said Administration, and was an accreving Right, not barred by the Marriage Agreement.

The Lord Chancellor *Jefferies*, on reading the said Marriage Settlement, and the said two former Orders, declared, That the said Order for the Excluding of the said Defendant *Dorothy* from having any part of the Personal Estate, was a just Order, and ought to stand and be pursued and that the said Order of the Lord Keeper *Norths* before mentioned, ought to be set aside, and Decreed accordingly.

Confirmed by *Jeffreys*.

Stapleton contra Dom. Sherwood, 34 Car. 2.
fo. 732.

THAT Sir *Phillip Stapleton* the Plaintiff's Father, on his Marriage with his first Wife, Setled the Mannor of *Warter* in the County of *York*, whereby he made himself but Tenant for life, the Inheritance vesting in the Plaintiff his Eldest Son; and Sir *Phillip* had Issue by his first Wife, the Plaintiff his Eldest Son, *Robert* his Second Son, and *Mary* who Married the other Plaintiff, the Lord *Merrion*. That Sir *Phillip* in 1647. by Will devised to his said Son *Robert*, a Rent charge of 40 l. per Annum, to be issuing out of the said Mannour, and afterwards the said *Robert*

Bill for Distribution of the personal Estate.

Robert died, and the Defendant *Dorothy* his Relict, Administred to the said *Roberts* Personal Estate, so the Plaintiffs Bill is to have Distribution of his Personal Estate.

The Defendant *Dorothy* insisted, That she as Widow of her said late Husband *Robert*, by the Custom of *York*, is Entitled to a Moiety of the said Personal Estate, and by the late Act for settling Intestates Estates, the said Defendant is Intituled to the other Moiety, and insisted, That Sir *Phillip* having Issue by several Venters which are yet alive, or their Representatives, they are equally intituled with the Plaintiff *Stapleton*.

This Court declared a Distribution of the said Personal Estate, according to Law, to be made amongst the Plaintiff *Stapleton*, and the Child of the Lord *Merrion*, as also the Brothers and Sisters of the said *Robert*, as well as those of the half-Blood, as those of the whole Blood, and their respective Lineal Representatives, who are to be called into the account.

And as to the point, whether the Lord *Merrion* and his Child, have the Right to his Wives share of the Estate, a Case is to be made.

36 Car. 2. fo.
375.

That the Master to whom the account of the Intestates Personal Estate was referred, hath allowed to the Defendant *Dorothy*

rather by the Administratrix, a Moiety of the said Estate of the said Intestates dying without Issue, and hath Distributed the other Moiety, amongst the Intestates Kindred, Brothers and Sisters. Whereas by the Custom of the Province of *Tork*, she is not only to have a clear Moiety of the Personal Estate of her said Husband so dying without Issue after Debts, &c. but by the late Statute for settling Intestates Estates, she is to have a Moiety of the other Moiety.

The Plaintiff insists, That there was no Colour for the Defendant to have a Moiety of the remaining Moiety, the said Statute leaving the Custom as it was, without Addition, Diminution or Inlargement; but the Widow was to have only a Moiety, and the other Moiety to be Distributed amongst the next of Kin.

This Court for the further satisfaction, ordered the Lord Arch-Bishop of the Province of *Tork* to testify, when a man dies Intestate within that Province, without Issue after his Debts, &c. paid, how the Residue is to be Distributed by the Custom of the Province.

The Custom of the Province of *Tork* Certified by the Arch-Bishop.

The Bishop certified, That in such Cases as aforesaid, the Widow of the Intestate by the Custom of the Province, had usually allotted to her, one Moiety of the clear Personal Estate, and the other Moiety

S

hath

hath been Distributed amongst the next of Kin to the Intestate ; and that had been the constant practice of the Ecclesiastical Courts at *York*.

The Plaintiff insisted, That the Custom of that Province is excepted out of the Act of Parliament, and if it were within the Act, it ought to have the more favourable construction on their part, because it was made in favour of them, and not of the Widow and Administratrix, who before the said Act, usually went away with the whole Estate, unless more particular instances prevented.

The Widow by the Custom of the Province of *York*, shall have the Moiety, but not another Moiety by the Act of Settlement of Intestates Estates.

This Court declared, They could not expound the Act, to give the Defendant more than a Moiety, that being the proportion allotted to her by the Custom, and also by the Act, if it had not been a Case within the Custom ; which Custom is confirmed, because it appoints the same kind of Distribution with the Act, and it would be a strein to give her more than a Moiety, part by the Custom, and part by the Act, and refers to the Masters Report made in this Cause.

Coventry contra Hall, 34 Car. 2. fo. 330.

That Sir *Thomas Thynn*, Father both of Sir *Henry Frenderick Thynn*, and Sir *James Thynn*, conveyed on Sir *Henry Frenderick*, and his Heirs Males of his Body, expectant after the decease of him the said Sir *Thomas*, the Mannour of *Hempsford* and other Lands, and soon after dyed, and the said Sir *Henry Frederick* possessed the said premisses, but Sir *James Thynn*, pretending the said Conveyance was Defective, Sir *Henry Frederick* in Oct. 1650. obtained a decree, that the said Sir *Henry Frederick*, and the Heirs of his Body, should enjoy the said premisses against the said Sir *James Thynn* and his Heirs, according to the intent of the said Settlement. That Sir *James Thynn* insisting, That Sir *Thomas* was but Tenant for life, and not Seized in Fee of the premisses, having suffered Recoveries, so that the Freehold was in the said Sir *James*, or some other for his use, by virtue whereof, he received the profits, which Sir *Henry Frederick* ought to have received: That Sir *Henry* not being able to recover the said mean profits at Law, by reason of the defect in the said Conveyance, which is now supplied and settled by the said decree, and Act of Parliament, so that the said Sir *Henry* hath the right to the said profits

and writings. So the Bill is to be relieved for the same, and to have an account thereof.

The Defendant insisted, That there ought to be no account of the mean profits, the demand thereof being very old, and is grounded on a decree in a former Cause, whereby a defect in a Conveyance, under which the Plaintiff claims was supplied, and there is no provision in the said decree for mean profits, though the Bill originally was such as this Court might have decreed mean profits, and when the Decree was made, it was not granted nor any farther relief than only possession, and the possession hath been so unconstantly in any one person, that it is very difficult, especially after so long time against an Executor, that is no way privy to the accounts of the Testator.

The Plaintiff insisted, That though the demand on the decree is Antient, and a prosecution hath been for the same ever since, and the Right being determined, the Plaintiff ought to have an account of the mean profits, as the Consequences of that Right, though the Original Bill might pray an account, and the decree be silent as to that point.

This Court declared, That considering this case, as if there were no Act of Parliament, the Plaintiff hath a right to demand

mand an account upon an equity that ari-
seth on the Marriage Agreement, and Set-
tlement made in pursuance thereof, not-
withstanding the length of time, for that
the Plaintiff or their Testator, could not
come sooner, than when the Title was
cleared; and the Objection raised from the
shortness of the former decree, is not ma-
terial to prejudice the Plaintiffs demand,
for that there could not then be any de-
cree for profits, the said Sir James pretend-
ing Title as Tenant in Tail, and that Sir
Thomas was but Tenant for life, so now the
Right being cleared, the Plaintiff ought to
have an account of the mean profits, from
the time the Right accrewed, and decreed
accordingly.

Mean profits
Decreed, tho'
a long time
since.

Account for
the mean
profits, from
the time the
right ac-
crewed.

The Defendant Appealing from the said
Decree made by the Lord Chancellor *Finch*,
to the Lord Keeper *North*, the Case was
heard *ab integro*, and the Lord Keeper on
hearing the decree in 1650. and the decree
of the Lord *Finch* read, declared, that there
was nothing in the case, but the loss of
time, and though the Decree in 1650. was
silent as to the mean profits, yet the same
ought to be no Objection to the Right, and
though it was omitted by the Decree in
1650. yet it ought in Justice to have been
decreed for the mean profits, as well as for
the right of the Title, it being an accessory
to the decree, and it ought to be judged

The mean
profits, tho'
omitted in a
former de-
cree, decreed
now.

nunc pro tunc, there being no Bar against it, and confirmed the Decree made by the Lord Finch.

Girling contra Dom' Lowther & al',
34 Car. 2. fo. 148.

THat Sir *Thomas Leigh* deceased, late Father of the Defendants *John Thomas* and *Woolley Leigh*, became indebted to *Edmond Girling* deceased, in several Sums of mony by Bonds, and the said *Girling* became bound for the said Sir *Thomas*, for several great Sums of mony, against which Securities Sir *Thomas* gave the said *Girling* Counterbonds; and in *Hillary* Term 28 Car. 2. Sir *Thomas* gave a Judgment of 1000 *l.* to the said *Girling*, for the payment of 530 *l.* and in *Aug.* 1669. Sir *Thomas* made his last Will in writing, and thereby devised to the Defendants Sir *John Lowther*, *John Currance* and *Edward Badby* Executors of his said Will, several Lands Lands and Tenements for the payment of his debts, and to be by them sold for that purpose: That the *Swan Inn* in *St. Martins Lane* being sold, there ariseth a Question touching the Mony raised by such Sale, whether it were well applied or not.

The Case being (*viz.*) That Sir *Thomas Leigh*, upon his Marriage with *Hannah Relfe*,

Relfe, Daughter of *Anthony Relfe*, whilst he was under Age by Articles previous to the said Marriage with the said *Hannah* agreed to settle on himself, and the said *Hannah* his intended Wife, and such as they should have between them Lands of 700 *l.* and in Consideration thereof, the said *Anthony Relfe* was to settle, and did settle upon the said *Thomas* and his Heirs Lands of 200 *l. per Annum*, whereupon Sir *Thomas Leigh*, July 1661. makes a Settlement upon himself, and the said *Hannah* his intended Wife, and their first, second and other Sons in Tail, his Mannor of *Addington*, and other Lands in *Addington*, and several Lands in *Com' Surrey* and *Kent*: That afterwards in May 1665. Sir *Thomas Leigh* mortgaged to Mr. *Peck*, for 2000 *l.* several Lands in *Middlesex* and *Norfolk*, and afterwards in December 1665. those Lands and the moiety of the *Swan Inn* in *St. Martins* and the Reversion thereof were granted to Trustees upon several Trusts, which by Deed 15 June 1668. appears to be performed and satisfied and thereupon on the same 15 June 1668. the said premisses were mortgaged to Sir *John Lowther* for 2500 *l.* which 2500 *l.* was raised and paid to Sir *John Lowther* out of the profits and by sale of the said *Swan Inn*, which was formerly by voluntary Conveyance dated and

Voluntary
Settlement.

setled by the said Sir *Thomas Leigh* upon the two Defendants *Thomas* and *Woolley Leigh* for Natural love and affection: That Sir *John Lowther* in April 1679. assigned the said Mortgage by conveying to one *Burton* and others, the Mannor of *Thorpe* in *Surrey* and *Shoelands*, and other premisses in Trust for the payment of such of the debts of Sir *Thomas Leigh* as should any ways incumber, or disturb the Purchaser of the *Swan Inn*, which said Lands are sufficient to pay the Plaintiffs debts, and the Testators Ingagement, being 1331*l.* which debt is to be paid the Plaintiff by Decree of this Court.

The Defendants the *Leighs* insist, That the Mony raised by the sale of the *Swan Inn*, although paid to redeem the other Estate in mortgage to Sir *John Lowther*, ought not to be applied, so that the Land ought to be discharged of the Mortgage mony, or of what was paid to redeem the same, but the said Lands ought still to be a Security for the said Mony to the use of the younger Children, for whose benefit the said *Swan Inn* was setled; and although the said Settlement was voluntary, yet the same being a provision for younger Children ought not to be adjudged fraudulent as to a subsequent Judgment (which the Plaintiffs is) or however not as to a subsequent voluntary Devise of their

their Father, under which only the Creditors by Bond come in, and therefore as to them the said mortgaged Lands ought to be charged with the said Mony, raised by the sale of the said *Swan Inn*, with Interest, since it was paid to redeem the said Estate, precedent to any benefit any Creditor by Bond can have out of the said Lands.

This Court declared, That the said Voluntary Conveyance ought not to stand in the way to prevent satisfaction of a (though a subsequent Judgment for good Considerations, and that the Monies due on the Plaintiffs Judgment, and the Monies raised by sale of the *Swan Inn*, was well applied to discharge the Mortgage on the other Estate whereby the mony due on the Judgment with Interest may be the more speedily raised by sale thereof, and the mony raised by sale of the said Inn after the Judgment satisfied with Interest ought to stand secur'd for the benefit of the younger Children, and be raised by sale of the said Estate, and by Rents and Profits in the mean time precedent to the other Creditors not on Judgment, and after the said Judgment and provision for the younger Children satisfied, the residue to be applied to the other Creditors, and decreed accordingly.

Mony applied to take off Mortgages, satisfy Judgments, and after to pay Bond-Creditors.

Comes *Arglas* contra *Henry Muschamp*,
35 Car. 2. fo. 524.

Relief a-
gainst over-
reaching
Bargains.

That *Thomas*, first Earl of *Arglas*, the
now Plaintiffs Father, and *William*
Earl of *Arglas* the Plaintiffs Brother, were
seised in Fee of the premisses in question,
and made divers Settlements thereof, by
which in case of failure of Issue Male of
the said *William*, the said Estate should
come to the Plaintiff and the Heirs Males
of his Body: That *Thomas* the Plaintiffs
Father died, leaving Issue Male only Earl
William and the Plaintiff, and Earl *Wil-*
liam is dead leaving Issue Male only the
last Earl *Thomas* the Plaintiffs Nephew;
and the said last Earl *Thomas* upon his
marriage with his now Wife levied a Fine,
and suffered a Recovery, but not with
intent to defeat the Remainder to the
Plaintiff, but only to settle a Joynture,
and several Deeds were executed leading
the Uses, by which there was a Remainder
in Fee reserved for the Plaintiff, for want
of Issue Male of the last Earl *Thomas*;
and the said last Earl *Thomas*, to
the intent the Reversion of the premisses
should come to the Plaintiff and the Heirs
Males of his Body, did for 300 l. convey
the said premisses to the use of the last
Earl *Thomas* for life, and in case of failure
of Issue male of his Body to the Plaintiff
and

and the Heirs males of his Body, with Remainders over: That Earl *Thomas*, the Plaintiffs Nephew, coming over into *England*, and getting acquaintance with the Defendant *Muschamp*, and being in want of Money the said *Muschamp* lent him 100 *l.* and for Security he prest the said Earl to make it out of his Estate in *Ireland*, and the said Defendant having the drawing the Security, brought the said Earl some Writings ready to be executed, of which the said Earl had no Copies or Counterparts, neither did he give time to peruse the same, and the said Earl relying on the Defendants Integrity, Sealed the same, believing the said Security to be void on payment of the said 100 *l.* as the Defendant affirmed it should; but the said Deeds being made to settle on the Defendant a Rent charge of 300 *l. per Ann.* to his own use, which being done by Fraud, there ought to arise a Trust which ought to go and be enjoyed by the Plaintiff according to the aforesaid Settlement made on the Plaintiff, and the Plaintiff is willing to pay the Defendant whatsoever Sum of Money he hath really lent or paid to the said last Earl *Thomas* with Interest.

The Defendant insists, That the said last Earl *Thomas* by Deed in 1675. for 300 *l. per Annum*, and other Considerations, granted to the Defendant a Rent-charge

charge of 300 *l. per Annum*, without any deduction to be issuing out of the Estate in *Ireland*, to be held by the Defendant and his Heirs, and to commence at such of the Feasts as should first happen after the death of the said last Earl of *Arglas*, without Issue male, with power to distrain, and a *Proviso*, That if the said last Earl should during his life time have, or at his death leave Issue male which do attain to the Age of 21, then the said Grant to be void, and of the said 300 *l.* there was at one entire payment 180 *l.* paid to the said last Earl, and the Defendant hath a Receipt for the said 300 *l.* and says, the Deed was fairly executed and made without any fraud or practice; and insists, That the said Grant of a Rent-charge was on a Contingency so uncertain, that 300 *l.* was a sufficient Consideration for the said Grant, which 300 *l.* was paid thus (*viz.*) 100 *l.* after the Agreement, and before the Conveyance of the said Rent charge, and 184 *l.* to the said Earl the same day the Conveyance was executed, and the said Mony was paid as Purchase-mony, and not as Mony lent, and the said Earl approved of the said Conveyance, though he had no Copy, and after the said Defendants purchase of the Rent-charge; and since the exhibiting of this Bill, the said Earl *Thomas* hath given

given the Defendant a general Release under Hand and Seal, wherein is declared, that the Bill is exhibited against the Defendant contrary to the said Earls direction, and disallowed all further proceedings thereon against the Defendant.

This Court upon reading the said deeds, and several presidents in this Court, as well in the Reigns of *Queen Elizabeth*, *King James*, *King Charles* the first, as in his now Majesties Reign, where relief hath been given against Over-reaching Bargains and Contracts made by young Heirs, and taking into consideration the Circumstances of this Case, it appeared to him, That *Thomas Earl of Arglas*, at the time of this bargain, was very young, and of an easie nature, and had forsaken his Wife and Friends, and came to *London*, where he lived in Riot and Debauchery, and for the supply of his Expences therein, was this bargain made, wherein it doth not appear, he took the Advice of any Friends or Counsel, but relyed wholly on the Defendant: That the consideration of this grant is very small, being but one years purchase for a Rent-charge in Fee-simple, which is now hapned in possession, and the over-value be it never so great, is not of it self sufficient ground to set aside a bargain, or where Fraud or upon this Court can presume fraud: Yet not. it is a great evidence of fraud, where there are

are other Circumstances concurring, as there is in this Case.

And whereas the Defendant insisted, that the Contingency of the death of a young Man without Issue Male was so great, that it cannot be esteemed an over-value, such a Reversion not being worth one years purchase.

His Lordship declared, He looked upon it as an Artifice of the Defendant, for it was easie to perswade the Earl *Thomas*, who could not judge of his own defects, that the Defendant had the worst of the Bargain. Whereas it is not likely the Defendant would have made it, but that he thought Earl *Thomas* would in a short time destroy himself by his Vicious and Debauched course of life, and his Lordship was of Opinion, the Defendant had Circumvented the Earl *Thomas* in this bargain, and concluded upon the whole matter, that the Plaintiff ought to be relieved in this Court, and the Release made by Earl *Tho.* without any consent after the Settlement made upon the Plaintiff, ought to be no Bar thereunto, but in as much as his Lordship found by the presidents, that in such cases, This Court doth not turn any loss upon the Defendant, but only correct the Excess and Extravagancy of such bargain; Therefore his Lordship thought fit, the 300 *l.* should be restored to the Defendant, with

A proper Bargain (tho' over-reaching) especially upon a Contingency relievable, but not to the damage of the bargainee.

with consideration for the same, at 6 *l. per Cent.* and on payment thereof, the Defendant to convey the said Rent charge of 300 *l. per Annum*, and all his Title, Interest and Demand in the premisses to the Plaintiff, and granted a perpetual Injunction, not only to stay all proceedings at Law, but for quieting the Plaintiff, his Heirs, &c. in the possession of the premisses.

Langton contra North & al, 35 Car. 2.
fo. 95.

That Sir Robert Gouning Deceased, be- Marriage
ing Seized of Lands, and a great Settlement.
Personal Estate, upon a Marriage to be had between him and the Defendant Dame Ann, Daughter of Sir Robert Cann, Articles of Agreement were executed, and in pursuance of the Articles, a Settlement of part of the premisses was made upon the Defendant Dame Ann, for her Joynture, and in the said Settlement, there was a Covenant on the said Sir Robert Gounings part, to lay out as much Mony in the Purchase of Lands, as would amount to 110 *l. per Annum*, to be settled on the said Dame Ann for her life, remainder to the Heirs of the said Sir Robert Gouning, which was intended to be an Inlargement of his Real Estate, and to be for the benefit of his Heir,

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His Lordship declared, He looked upon it as an Artifice of the Defendant, for it was easie to perswade the Earl *Thomas*, who could not judge of his own defects, that the Defendant had the worst of the Bargain. Whereas it is not likely the Defendant would have made it, but that he thought Earl *Thomas* would in a short time destroy himself by his Vitious and Debauched course of life, and his Lordship was of Opinion, the Defendant had Circumvented the Earl *Thomas* in this bargain, and concluded upon the whole matter, that the Plaintiff ought to be relieved in this Court, and the Release made by Earl *Tho.* without any consent after the Settlement made upon the Plaintiff, ought to be no Bar thereunto, but in as much as his Lordship found by the presidents, that in such cases, This Court doth not turn any loss upon the Defendant, but only correct the Excess and Extravagancy of such bargain; Therefore his Lordship thought fit, the 300 *l.* should be restored to the Defendant, with

A proper Bargain (tho' over-reaching) especially upon a Contingency relievable, but not to the damage of the bargainee.

with consideration for the same, at 6 *l. per Cent.* and on payment thereof, the Defendant to convey the said Rent charge of 300 *l. per Annum*, and all his Title, Interest and Demand in the premisses to the Plaintiff, and granted a perpetual Injunction, not only to stay all proceedings at Law, but for quieting the Plaintiff, his Heirs, &c. in the possession of the premisses.

Langton contra North & al, 35 Car. 2.
fo. 95.

That Sir Robert Gouning Deceased, be- Marriage
ing Seized of Lands, and a great Settlement.
Personal Estate, upon a Marriage to be had between him and the Defendant Dame Ann, Daughter of Sir Robert Cann, Articles of Agreement were executed, and in pursuance of the Articles, a Settlement of part of the premisses was made upon the Defendant Dame Ann, for her Joynture, and in the said Settlement, there was a Covenant on the said Sir Robert Gounings part, to lay out as much Mony in the Purchase of Lands, as would amount to 110 *l. per Annum*, to be settled on the said Dame Ann for her life, remainder to the Heirs of the said Sir Robert Gouning, which was intended to be an Inlargement of his Real Estate, and to be for the benefit of his Heir,

Heir, but the said Defendant Dame *Ann* refuseth since the death of Sir *Robert Gouning* her Husband, to whom she is Administratrix, to execute the said Covenant in *Specie*, by Purchasing of Lands of 110 *l. per Annum*, to be settled according to the Covenant as aforesaid, and which ought to come to the Plaintiffs as Coheirs of the said Sir *Robert Gouning*.

Covenant to settle Lands of 120 *l. per Annum* to the said Remainder to the Heirs of the Husband, Wife Administratrix refuseth the Bill was dismissed.

The Defendants insisting, that the said Covenant was made in favour of the said Dame *Ann* only, and not for the Plaintiffs the Heirs benefit, and the Defendant also as Administratrix, claims Title to the Mortgaged Lands at *Siston*, insisting, that the same are a Chattel Lease for a long Term of years, which by Assignment, came to *Mary Gouning*, Sister of the said Sir *Robert*, and that she afterwards procured a Release of the Equity of Redemption for 950 *l.* including therein the Mony due upon the said Mortgage, and that she purchased the Reversion in Fee thereof, in the name of her Brother Sir *Robert*, which she did on purpose to keep the Lease distinct and separate, and that it ought not to go to the Heir, but to the Administratrix.

But the Plaintiff insists, That the said Lease ought to attend the Inheritance, which *Mary Gouning*, to whom the Plaintiffs are Heirs, bought in for that purpose, in the name of the said Sir *Robert* her Brother,

ther, and that the same ought to come to the Plaintiffs, as other the Real Estate of the said Sir Roberts.

This Court declared, as to the Lands at *Siston*, it was an Inheritance, and ought to go to the Heirs at Law, and decreed accordingly. Leafe to attend the Inheritance.

And as touching the Covenant for Purchasing Lands of 110 l. per Annum, this Court dismist the Bill.

Eyre contra Hastings, 35 Car. 2.
fo. 590.

That *Henry Eyre* deceased, the Plaintiffs Brother, being seized of Lands, Relief upon a Mortgage.
22 Car. 2. Mortgaged the same for 200 l. to *Giles Eyre* the Plaintiffs Son, and the said *Henry Eyre*, Covenanted to pay the Mortgage money, and gave Bond for performance of the Covenants, and the said *Henry* dying without Issue, and Intestate the premisses descended on the Plaintiff as Brother and Heir, and Administration was granted to *Dorothy* his Relict, who paid the Mortgage money and Interest then due to the said *Giles Eyre*, the Mortgagee in relief of the Plaintiff, who ought to enjoy the premisses discharged of the Mortgage money, and the said *Dorothy* made her Will, and the Defendant *Ralph Hastings* Senior her Executor, hath got the Mortga-
T ged

ged premisses Assigned to him, and insists, He ought to hold the same till the 200 l. and interest be paid him by the Plaintiff.

That the Defendant *Ralph Junior*, an Infant, claims the premisses by the Will of the said *Dorothy*, who devised the same to him.

To be relieved against them, and the Plaintiff to have the Inheritance of the premisses, discharged from the payment of the Mortgage money and Interest, and the Bond delivered up, is the Bill.

Whether Mortgage Money be paid by the Administrator, in relief of the Heir. The Defendant *Hastings Senior* insists, That the said *Dorothy* paid the said Mortgage money and interest; but not in relief of, or for the benefit of the Plaintiff, and thereupon the premisses were Assigned to the said *Hastings Senior*, in Trust for the said *Dorothy*, who had an equitable Right to all her Husbands Estate, and *Dorothy* devised the said premisses to *Hastings Junior* her Godson.

The Master of the Rolls decreed the Plaintiff to enjoy the premisses against the Defendant.

This Cause was Re-heard by the Lord Keeper, and this Defendant the Infant, insists, That he is much prejudiced by the Decree; for that thereby he is stript of the Estate in question, devised to him by the said *Dorothy's* Will, without payment of the

the money and interest, there being no Covenant in the said Mortgage Deed, for payment of the money and interest, or any Bond ; but the Plaintiffs Counsel insisted, That *Dorothy* paid the Mortgage money, and interest for the Plaintiffs benefit.

The Defendant insisted, that *Dorothy* declared the Mortgage money and interest was paid in relief of the Heir at Law.

This Court declared, That in Case there was not any Covenant in the Deed, for payment of the Mortgage money and Interest, the said *Dorothy* the Administratrix was not obliged to discharge the same.
 If there be no Covenant in the Mortgage Deed for payment of the Money, the Administrator is not obliged to discharge it.

Massingberd contra Ash, 35 Car. 2.
fo. 466.

THis Court ordered a Case to be Sta-Executory
ted in this Cause, upon the Deed Devises.
(only) by way of Executory Devise, to
bring the question arising into Determination, as if in a Will, and in such method as if the Trust and Limitations in the deed, had been Limited and Created by the Will; upon which Case, the Judges of the *Common Pleas* were to Certifie their Opinions, Whether the Remainder of a Residuary Estate of the two Leases or Terms in question limited to the Plaintiff, were a good Devise or Limitation or not, and the

said Judges were also to be attended with another Case made upon both Deed and Will, and they are to Certifie what the Law is, in Case of Executory Devise, as also what is fit to be Decreed in Equity.

The Case on the Deed only by way of Executory Devise is, (*viz.*)

Two severall Terms, one for 500 and the other for 99 years by Will, dated the 1st. of November 1679. and devised in these words, (*viz.*)

That Sir Henry Massingberd and his Assigns, shall take the Rents, Issues and Profits, for and during the Term of his life.

And that after his Decease, Elizabeth his Wife should receive the Rents, Issues and Profits during her life.

And after the Decease of the said Sir Henry and Elizabeth, the Eldest Son of the said Sir Henry, begotten upon the Body of the said Elizabeth, shall take the Profits of the said Lands till Age, and then to have the whole Term to him, his Executors and Administrators.

And if such Eldest Son happen to dye before he comes of Age, then the second Son of their two Bodies, shall take the profits of the said premisses, till he come of Age, and then to have the whole Term.

And if such second Son die before he comes
of

of Age, then the third Son to have and receive as aforesaid, and if such Son die before he likewise comes of Age, then the fourth Son to have and receive as aforesaid.

And in Case of no Issue Male between Sir Henry and Elizabeth living at the time of the death of the Survivor of them, who shall live to their Age; and that there shall be one or more Daughter or Daughters of the said Sir Henry and Elizabeth, that then the said Daughter or Daughters, their Executors and Administrators, to have and take their several equal shares and proportions of the said Rents, Issues and Profits, for and during the said Terms.

Unless William Massingberd the new Plaintiff, should within six Months after the death of the Survivor of them the said Sir Henry and Elizabeth, pay such Daughter or Daughters, or secure the several Sums following (viz.) if but one Daughter 1000 l. and if more, then to every one of the rest 500 l. a piece, and after the same paid or secured, in case there shall be no such Son or Daughter living at the time of the death of the Survivor, of the said Sir Henry and Elizabeth, or which should live to attain his or her Age, then the Residue of the said Terms, to go and to be to Sir William Massingberd the now Plaintiff, his Executor and Administrators.

Sir *Henry Massingberd* dies in Sept. 1680. leaving his Wife *Elizabeth* Enfant of a Son after born and named *Henry*, who died within six Weeks after.

Sir *Henry* and *Elizabeth* had no other Issue, which *Elizabeth* is now the Defendant.

Who is eldest Son of Sir *Henry*.

Quere, Whether the said Devise to *William Massingberd*, the now Plaintiff be good.

The Case upon both Deed and Will.

Deed of Trust and Will.

That Sir *Henry Massingberd* being possed of two several Terms, one for 500 and the other for 99 years by the Indenture, 2 Nov. 1679, made an Assignment thereof to Trustees upon Trust.

To permit and suffer him the said Sir *Henry* and his Assigns, to receive the rent and profits during his life, and after his death to permit the Defendant *Elizabeth*, then *Elizabeth Rayner* his intended Wife to receive the Rents and profits during her life, then upon Trust to assign the residue of the said Terms to such person or persons, and for such Estates and Terms, and in such manner as the said Sir *Henry* should by Will, in writing nominate, limit and appoint, give, devise or dispose thereof, or any part thereof, and in

in case the said Sir *Henry* should die Intestate, or should not by his Will, nominate, limit, appoint, give, devise, or dispose of the same and every part thereof; that then the Trustees should permit the eldest Son of the Body of the said Sir *Henry*, on the Body of the said *Elizabeth*, to receive the Rents, Issues and profits of the premisses undisposed of by the Will of the said Sir *Henry*, till he should attain his Age, and should then assign to him, his Executors and Administrators, the residue of the said Terms; and in case the eldest Son should die before Age, then the Trustees should permit the second Son to receive the Rents and profits, with the like Trust to Assign to him at his Age, and so to the 3^d and 4th Son in like manner.

And in case of no Issue male between them, at the time of the death of the Survivor of them, the said Sir *Henry* and *Elizabeth*, which should live to attain their respective Ages, and that there should be one or more Daughter or Daughters between them, that then the Trustees should permit the said Daughter and Daughters, her and their Executor and Administrators, to take their several equal shares, and proportions of the said Rents, Issues and profits, not devised or disposed of the Will of the said Sir *Henry*, for and during the

said Terms, unless *William Massingberd* the now Plaintiff, the eldest Son and Heir of the said *Sir Henry* by a former Venter, should within six Months after the death of the Survivor of them, the said *Henry* and *Elizabeth* pay unto such Daughter or Daughters, or secure to the good liking of the Trustees, the several Portions therein mentioned for the said Daughter or Daughters, and after the said Portions paid or secured; or in case there should be neither Son nor Daughter living, at the time of the death of the Survivor of them, the said *Sir Henry* and *Elizabeth*, or that should live to their respective Age, that then the Trustees should assign the residue of the said Terms, to the said *William Massingberd*, his Executors and Administrators.

Then there is a power of Revocation in the said *Sir Henry* by Deed or Will, to revoke and make void this present Deed, and the Estate, and Estates, Trust and Trusts of the premisses, or any part thereof.

Residuary
Legatee.

After this, *Sir Henry* made his Will in writing, and the Defendant *Elizabeth* his Lady Executrix, and Residuary Legatee, and devised in these words, (*viz.*) 'I do hereby give unto her all my Estate, which I have by Deed settled upon her, according to the true meaning and intent

'tent of the said Settlement: And also I
 'give her all those other Lands hereby,
 'hereafter Setled upon her, according to
 'my true intent of my Settlement there-
 'of for her life, or on my Issue by her;
 'And I do also give her all my Estate,
 'concerning my interest in the Colledge
 'Leases from *John Rutter of Canterbury*,
 'and also all my Goods and Chattels,
 'not hereby otherwise disposed of, I will
 'that all the Coppyholds any ways ap-
 'pertaining to *Paston*, be taken to the use
 'of my Ececatrix, and also the Bishops
 'Lease when need is, that it be renew-
 'ed also to her use, and also the Lease
 'for 500 years of *Paston* all at her charge,
 'according to the true intent of my Set-
 'tlements upon her, which I hope my
 'Son *William* will endeavour, as before
 'the Almighty, to make good unto her
 'and hers; and if either I have no Issue
 'by her, or that they or their Issue all die,
 'so that the succession be expired; Then
 'after my Wives decease, I hereby give
 '(upon my Sons wilful neglect or refusal
 'of his duty herein, and not otherwise;)
 'all my said Lands not setled on him by
 'his Marriage; to all the Daughters of my
 'Daughters *Sinderfon* and *Stoughton*, to be
 'divided among them. Yet always pro-
 'vided, that if my said Son neither neg-
 'lect, nor refuse any reasonable duty
 'herein;

herin; Then my Will is, that after my Wives decease, and that all her Issue by me be either dead, or have their Portions paid them as is provided, That then all my said Lands settled on her for life, whether Copy hold, Lease hold or Freehold, with all the rest unsetled shall discend, and be to him and his Heirs for ever.

Sir *Henry Massingberd* left no Issue living by that Wife, but left his said Wife Enfient of a Son born alive, and named *Henry*, but he died about six Weeks after; to whom the Lady is Administratrix.

The Judges Opinion upon both these Cases.

Remainders of a Term successively in a Deed of Trust, being limited and confined to fall within 21 years are good, and no Perpetuities.

WE have heard the Case of *Massingberd* and *Ash*, referred to us, Argued by Council on both sides, both upon the Deed of Trust and upon the Will, and are all of Opinion, That the whole weight of the Case rests upon the Deed of Trust, and that the Will, though it have some Clauses in it, which if they were substantive of themselves would alter the case; yet as it is penned, and the Clauses all bound up with relation to the Deed of Trust it does not: And we are likewise of Opinion, That all the Remainders and Contingencies in the Deed of Trust, being limited and confined

fixed to fall within the compass of 21 years are good, and that therefore the remainder of the Term ought to be decreed to the Plaintiff Sir *William Massingberd*.

Febr. 17.
1684.

Thomas Jones.
Creswell Levings.
J. Charlton.
T. Street.

The Lord Keeper declared himself of the same Opinion with the Judges, That the Remainder of the said Terms after the death of the said Dame *Elizabeth* were good Remainders in Law, and that the Plaintiff Sir *William* ought to enjoy the premisses for the remainder of the said Terms accordingly, and decreed the same.

Nodes contra Batle, 35 Car. 2.
fo. 106.

THe Bill is, That the Defendant may redeem, or be fore-closed, and the Defendant being served with a *Subpœna* refuseth to appear, and sits out all process of Contempt to a Serjeant at Arms returned, and cannot be apprehended.

The Plaintiff prays, the Bill may be taken *pro Confesso*.

This

This Court declared, In regard the Defendant hath not appeared, this Court could not decree the Bill *pro Confesso*, but ordered a Sequestration against his real and personal Estate, until he cleared his Contempt.

The Bill not to be taken *pro Confesso*, if the Defendant hath not appear'd, but a Sequestration shall issue out against him.

Moor contra Hart, 35 Car. 2.
fo. 60.

Marriage
Agreement.

THat a Treaty of Marriage was had between the Plaintiff and *Ann* his Wife, the Defendants Daughter, who promised to give with her 4000 *l.* but when the Defendant perceived them to be mutually ingaged, began to recede from his Promise, which the Plaintiff finding, a Letter was wrote to the Defendant by a Friend of the Plaintiffs, desiring him to be plain, and ascertain what Portion he would give the Plaintiff with his Daughter, and then the Defendant agreed to give 1500 *l.* down, and 500 *l.* more at his death, if she should have Issue, and both Sums to be charged on his Estate at *Creton* and *Wapingham*, which Agreement was in Writing, and signed by the Defendant, and he did in Answer to the said former Letter exprefs and declare as much under his Hand, and thereupon the Marriage took effect.

But

But the Defendant pretended, he never made any such Agreement, and that the Plaintiff married his Daughter without his Consent, but confesseth he received a Letter from one *Reeve*, a Friend of the Plaintiffs, wherein he desired the Defendant to be clear, and say what he would lay down upon the Nail in marriage with his Daughter to the Plaintiff, and what he would secure to be paid at his death; and that he sent a Letter to *Reeve* in Answer, wherein he acknowledg'd the Plaintiffs deserts exceeded his ability, and with all plainness acquainted him, he would give her 1500 *l.* in present out of his Estate at *Creton*, and 500 *l.* more at his death, if she should have Issue then living; but that afterwards Mr. *Reeves* sent a Letter in Answer to that, whereby the Treaty and Proposals are absolutely waved, and the Defendant never further Treated; but the Marriage was had without his Consent, and without any Agreement in Writing or Settlement, and therefore he insists upon the Act, for prevention of Frauds and Perjuries.

To which the Plaintiff insists, The last Letter sent by *Reeve* was no manner of the Treaty or Proposal in the former Letters in *Jan.* 1680.

This

Letters
under ones
Hand, shall
amount to
a good
Agreement
within the
Statute of
Frauds and
Perjuries.

This Court, on reading the several Letters sent by *Reeve* to the Defendant, in the behalf of the Plaintiff, and the Defendants Answer thereunto, This Court is fully satisfied, the Plaintiff upon his Marriage became well intituled to the 1500 l. agreed by the Defendant under his own Hand, to be paid to the Plaintiff as his Wives Portion, out of his Estate at *Creaton*; and decreed accordingly.

Bradbury contra Ducem Bucks, 36 Car.2.
fo. 401.

Interest upon
Interest,
decreed.

THIS Court did declare, That the Plaintiffs ought to have Interest for their Interest Money from time to time, when it is a stated Sum.

Dom' Pawlet contra Dom' Pawlet, 36 Car.2.
fo. 516.

This is upon a Case stated, viz.

Trust for
payment
of Debts,
Maintenance
of
younger
Children,
and raising
Portions.

THAT *John*, late Lord *Pawlet*, on Marriage with the Plaintiff the Lady *Susanna* his second Wife, and of her Portion, settled a Joynture of 1000 l. per Annum on her, and afterwards having 3 Children, (viz.) the Defendant the now Lord *Pawlet*, and *Susanna*, and *Vere Pawlet*, by Deed conveyed Lands to Trustees, and

and their Heirs, (*viz.*) to the use of the said Lord *Pawlet* for life, charged with Portions for his Daughters, by the Lady *Essex Pawlet* his former Wife, and after the death of the said Lord *Pawlet*, to the use of *Francis Pawlet* and others, for 500 years on Trust, that they should after the commencement of the 500 years, out of the Profits, or by Leases, or other lawful ways out of the premisses, allow the now Defendant Maintenance, and also sufficient to pay all the late Lord *Pawlets* debts, and maintenance for the younger Children; and after that to raise Money to pay the younger Childrens Portions in such manner and time as the said Lord *Pawlet* should by any Writing or last Will appoint, and in default of such limitation or appointment, the Trustees to raise 4000*l.* apiece for every younger Son, and 4000*l.* apiece for every Daughter of the said Lord *Pawlet* by the Lady *Susanna*, to be paid at their Ages or day of Marriages, if such Portions could conveniently be raised, and if not, then so soon after as the same could be; with this further, That every younger Son and Daughter should have Maintenance till Portions paid; and after all the said Sums raised, the Remainder of the 500 years, to be surrendered to whom the immediate Reversion belonged, which is now the Defendant.

That

That the late Lord *Pawlet* by Will in 1677. (and published at the same time when the said Deed was executed) gave to his said two Daughters *Susanna* and *Vere Pawlet* 4000 *l.* for their respective Portions, to be paid them as the said Deed directed, and made the said *Francis Pawlet*, and the other Trustees, Executors.

Will pursuant to a Settlement, for raising Portion.

That *Vere Pawlet*, one of the said Daughters died, and the Plaintiff her Mother took Administration to her Estate, and thereby intitles her self to the said Portions of 4000 *l.* appointed to be paid to the said *Vere* at her Age or day of Marriage.

And the Question now being, Whether the Plaintiff by virtue of such Administration, is intituled to the Portion of her said Daughter *Vere*, who died before her Age or day of Marriage, and the Trustees should be compelled to raise the same out of the Trust of the Term of 500 years, which was granted out of the Defendant, the now Lord *Pawlet*, the Infants Inheritance.

Difference between a Legacy and a Trust.

This Court upon perusal of Presidents declared, they did not find any of the Presidents that came up to this Case, and conceived there was a great difference between a Legacy and a Trust, for that a Trust is expounded according to the intent

tent of the party, but a Legacy is governed
 by the Rules of Common Law, and an
 Executor who is to have the residue in
 one case, is not of so great regard as the
 Heir, who is to have the residue in the
 other: That this case is of general concern
 to all Families, for it was grown a thing
 of course, to charge the younger Chil-
 drehs Portions upon the Heirs Estate,
 which would not have been charged, but
 for these occasions of providing for Chil-
 dren. And in this case, the time of pay-
 ment never hapning, but becoming impos-
 sible by the death of the Child before the
 Portion was payable, the Plaintiff has no
 right to demand it: And it were hard for
 this Court to make a Strain against the
 Heir, where the consideration failes, for
 which the Portion was given, (*viz.*) the
 advancement of the Children; and altho'
 there were a Will in the case, yet it refers
 to the Deed, and was made at the same
 time, so that it does not at all alter the con-
 sideration of the Case, and it would be
 hard to dectee the payment presently, for
 that were to wrong the Heir, who is to
 have the proceed of the Mony beyond the
 maintainance until the time of payment;
 This Court saw no ground to take it from
 the Heir at Law, to give it to an Admini-
 strator, who might have been a Stranger;
 and so dismiss the Plaintiffs Bill.

Settlement
 for the ray-
 sing of
 4000 l.
 Portion to
 two Daugh-
 ters, to be
 paid at Age
 or day of
 Marriage,
 one dye be-
 fore, her
 Portion shall
 not go to
 her Admini-
 strator, but
 the Heir
 shall take
 profits.

The Presidents used in this Cause for the Administrators were, *Rowley contra Lancaster*, *Brown contra Bruen*, *Clobery contra Lampen*.

The President for the Heir, *Gold contra Emery*, This Cause was heard in Parliament, and the dismission confirmed.

Woodhall contra Benson, & al' 36 Car.2.
fo. 314.

Settlement,
Will.

THat *John Wirley* deceased, being possessed of divers Mannors and Lands for 320 years, that the said Term came to the Defendants *Adams* and *Shagburgh*, in Trust for payment of Monies, and after in Trust for *Edward Colley*, Grandson of *John Wirley* for his life, and after his decease to the Plaintiff *Ann*, late Wife of the said *Edward Colley*, and the said Plaintiff *Ann* to have 130 l. per Annum for her life, which Settlement was made in consideration of Marriage, and after the death of *Edward Colley*, the Trustees were directed to permit the Heirs Males of *Edward* on the Plaintiff *Ann* to be begotten, to receive the residue of the profits, and in case of no Issue Male of her, there is provision for Daughters, and Limitations over to the said *Edward Colley's* Heirs Males; and it was also declared, that in case the Plaintiff *Ann* should survive

vive the said *Edward*, then she to have the moiety of the Mannor house for her life; that the Trust limited to the Heirs Males of *Edward*, and the Remainders thereupon depending are void, and the benefit of the whole Trust was in *Edward*, for that the Trust would not be Intailed.

That by another Deed it was declared by the said *Edward Colley* and his said Trustees, that in case the Plaintiff *Ann* should have no Issue, she should have the whole Mannor house above the 130 *l. per Annum*, and by another Deed, the said *Edward Colley* by consent of his said Trustees declared, in case the said *Edward* should die leaving the Plaintiff *Ann* no Issue, and should not otherwise dispose of the residue of the profits of the premisses over and above the Rents and Charges payable as aforesaid, then his said Trustees after his death, should by Sale or Leases of the premisses pay all debts, and after all debts paid, to permit the Plaintiff to receive the residue of the profits for her life, and after her death to permit the right Heirs of *Edward* to receive the same: That the Trust for the right Heirs of *Edward* was void and reverted, and the said *Edward* did afterwards declare, that in case he had no Issue, he intended to leave his whole Estate to the Plaintiff *Ann*.

That the said *Edward*, 22 Jan. 26 Car.2. made his Will in writing, reciting the Agreement in the last Deed touching payment of his debts, and after some small Legacies devised to his said Trustees all the rest of his personal Estate in Trust, that they should pay his debts as aforesaid, and declared his meaning to be, that his Executors after his debts paid should deliver the overplus to the Plaintiff *Ann*, deducting 5 *l.* a piece for their pains and all charges; That *Edward* soon after dying the overplus belonged to the Plaintiff, and the said Trustees possessed the premisses and the personal Estate, and the Plaintiff *Ann* having since intermarried the Plaintiff *Woodhal*, whereby the whole belongs and remains unto him in right of his Wife, and the said Trustees ought to Assign to the said Plaintiff: But the said Trustees pretend the Trust and Term aforesaid, doth after the Plaintiff *Anns* death belong unto the Defendant *Gabriel Ciber* and *Jane* his Wife, she being the only Sister and Heir at Law of the said *Edward Colley*; That the Defendant *Benson* knowing of the Will and Settlement aforesaid, purchased the premisses of the Defendant *Ciber* and his Wife, and the Trustees Assigned to him.

The

The Defendants, the Trustees insisted, That their names were used in the Marriage Settlement of *Edward Colley*, upon his Marriage with the Plaintiff *Ann*, in which Settlement was recited a Conveyance made by *John Wirley*, whereby he did demise the Trusts therein mentioned, and the premisses in Trusts as to *Clark's* Farm, for such persons as he or his Executors should by Will or otherwise direct, and several other persons upon several other Trusts, and as to several parcels of the said premisses which the said Defendant conceived, was the Estate lately enjoyed by *Edward Colley* in Trust for such persons as the said *John Wirley* should direct, and for want of such appointment to *Jane* his Daughter for her life, and after to *John Colley* her Son and Heir and his Issue Male, and for want of such Issue in Trust for the Daughters of the said *Jane*, and after the death of *Jane* and *John*, *Edward* was intituled, and he together with Sir *John Wirley* the Surviving Trustees upon *Edwards* marrying with the Plaintiff, did Demise to the said Defendants the Trustees, the Mannor-house, &c. for the Term of 20 years in Trust to pay certain Annuities therein mentioned, and to permit *Edward Colly* for his life to receive the profits of the residue, and in case the Marriage took effect, and the

Plaintiff *Ann* Survived him, then to pay her 130 *l. per Annum* for her life, and after *Edwards* death, to permit the Heirs males of their two Bodies to receive the residue of the profits, and for default of such Issue male there is provision for Daughters, and supposes the residue of the profits may be limited to any Issue male of *Edwards*, and for want of such Issue, to permit the Defendant *Jane* and *Ann* since deceased Sister, of the said *Edward*, to receive the profits of the Estate as the Deed expresses, and that he remembered no other Agreement than what is mentioned in the said Deed, and sets forth the Deed of 21 *Jan.* 26 *Car.* 2. whereby the said Defendants, the Trustees were intituled by Sale or Leases to pay debts, and after payment thereof (if the Plaintiff *Ann* should be then living) should permit her to receive the residue of the profits for her life, and after her decease the right Heirs of *Edward* to receive the same; that after the time of executing the last mentioned Deed, the said *Edward* made his Will, and after some Legacies took notice of the said Deed bearing date the day before, and it was declared thereby, that the Defendants, the Trustees should out of the profits pay all his debts, and being fearful those profits should not do, did Devise to them all the rest of his personal

personal Estate, and made them Executors, and after debts paid the residue to the Plaintiff *Ann*. That Nov. 1676, *Edward Colley* died, after which the said Defendant proved the Will, and entred on the Estate; But the Defendants *Ciber* and *Jane* his Wife insisted, That the said Defendant *Jane* being the only Sister and Heir to *Edward Colley*, are after his debts intituled to the premisses for a long Term, to commence after the death of the Plaintiff *Ann*, and have sold their interest to the Defendant *Benson*.

Upon reading the said Deed and Will, A Term in the Lord Keeper *North* was of opinion, gross, and that the said Term so as aforesaid Created, not to be Entailed. was a Term in gross, and so not capable of being intailed, and therefore it could not descend to the Heir of *Edward Colley*, but that the same should be liable to the payment of his Debts, and that the Plaintiff *Ann* should hold the 130*l.* per An. for her life, and after the said Debts paid, the Plaintiff *Ann* should receive the profits of the whole Estate for her life, charged with the said Annuity, and the said Plaintiffs were to redeem the Mortgage to the Defendant *Woodward*: But as to the Residue of the said Term, after the death of the Plaintiff *Ann*, and debts paid, how the same should be disposed, a Case was ordered to be made.

A Case being Stated, this Cause came to be heard thereon before the Lord Chancellor *Jefferies*, and all the former pleadings being opened, as also the Defendant *Cibers* cross Bill, which was to this effect (*viz.*) to have the said Term of 820. years to attend the Inheritance, and the Case stated, appearing to be no otherwise than before is set forth.

A Residue of a Term after debts paid and a life determined, Decreed not to the Residuary Legatee, but to the Heir.

His Lordship on reading the said Deed and Will, the Question being, who shall have the remainder of the Term in the said Lease, whether the Plaintiff *Ann* as Residuary Legatee, or whether she shall have only an Estate for life, his Lordship declared, that the Deed and Will do make but one Will, and by them there was no more intended to the Plaintiff *Ann*, than an Estate for her life, and that she ought to enjoy the whole Mansion House *cum pertinent* during her life, and also the overplus of the profits of the Residue of the said Estate after Debts and Legacies paid, and the Defendant *Benson* who purchased the Inheritance of *Ciber*, to enjoy the same, discharging all things as aforesaid.

Hall contra Dench, 36 Car. 2.
fo. 799.

THat the Plaintiff *Grace Hall*, being Will.
Daughter of *William Knight* deceased Revocation.
ed, who was Son of *Susanna*, one of the
Sisters and Coheirs of *Thomas Bridger* de-
ceased, which said *Thomas Bridger* being
seized in Fee of Lands in *Binstead* and
Middleton, and having no Children, made
his Will in 1663. by which he gave to *Tho.*
Knight Son of the said *Willi. Knight*, all his
Lands in *Binstead* to the said *Thomas Knight*,
and the Heirs of his Body, and for want
of such issue, then to the Plaintiff *Grace*,
and the Heirs of her Body, with Remain-
ders over, and by the same Will, Devised
one Moiety of the Lands in *Middleton*, to
the said *Thomas Knight*, and the Heirs of his
Body, with the like Remainders over, and
sometimes after the said Will, the said *Tho-*
mas Bridger Mortgaged the said Lands in
Binstead, to *John Comber* and his Heirs for
500 *l* and the said *Bridger* repaid the 500 *l*.
and had the Mortgage delivered up and
Cancelled, but no Reconveyance of the
Lands, and that the said *Comber* after that,
was but a Trustee for *Bridger* the Mort-
gagee, who in 1682. declared, that the
Will he made in 1663. should stand, and
be his last Will, and then denied: But the
Defens.

Defendant *Dench* having got the Cancelled Deed in his Custody, and the Plaintiff brought an Ejectment under the Title of the Will, and got a verdict for the Lands in *Middleton*, but the Defendant at the Tryal, setting up a Title in the Defendant *Comber*, upon the Cancelled Mortgage for the Lands in *Binstead*, a Verdict passed for the Defendant, so to have the said Mortgage deed delivered up, and the Plaintiff to enjoy the premises according to the said Will, is the Bill.

The Defendants as Co. heirs at Law to *Bridger*, insist, That the Testator *Bridger*, never intended that the Estate should go as that Will directed, in regard he soon after the said Will, Mortgaged the same to *Comber*, and besides the Legatees and Executors in the said Will, were most of them dead before the said *Bridger*, and the Mortgage money was not paid till after the Estate forfeited, and that the Mortgage to *Comber*, was an absolute Revocation of the said Will, and upon an Ejectment brought by the Plaintiff under the said Will, the Defendants obtained a Verdict for the Lands in *Binstead*, wherein the validity of the said Will was in issue.

The Plaintiffs insist, That the Verdict obtained by the Defendants as aforesaid, was, by reason the Title in Law was in *Comber* the Mortgagee, and not upon the
Valis

Validity of the Will, and that a Verdict had been had in affirmation of the said Will for other Lands therein mentioned, and the Testator was in possession of the premises at the time of his death.

This Court (the Defendants insisting to have it tryed at Law, whether a Revocation of the said Will or not) declared there was no Colour to direct any Trial at Law in this Case, for that on reading the proofs, it plainly appeared, that the Testator expressly declared, the said Will should be his last Will, and that upon such an express proof, it would be vain to direct a Tryal at Law, and declared, that when the Mortgage money was paid, the Mortgagee and his Heirs immediately from that time, became Trustees for the Mortgagor and his Heirs, and the Court having considered of several precedents, as well Antient as Modern, which were full in the point, that notwithstanding such Revocation, yet there was a Republication of the Will, and that the same was a Republication of such a nature, that made the said Will a good Will, and decreed the Defendant *Grace*, to enjoy the premises according to the said Will.

When the Mortgage money is paid, the Mortgagee and his Heirs are Trustees for the Mortgagor and his Heirs.

A Will, and after that a Mortgage, the Will is Republished its a good Will, and not revoked.

This Cause came to be Re-heard before the Lord Chancellor *Jefferies*, who was well satisfied with the Republication, and declared, that notwithstanding the said Mortgage

Mortgage, the Will was a good Will, and not revoked, and confirmed the former decree.

Pullen contra Serjeant, R6 Cvr. 2.
fo. 570.

Executrix
dies before
the Testator,
there shall
be Admini-
stration, *cum*
Testamento
annex.

THE Bill is to have a discovery of the Estate of *Ann Nurse* deceased, and a distribution to be made, and the Plaintiffs to have their proportions thereof, they being next of Kin to the said *Ann Nurse*, (*viz.*) the Plaintiff *Ann*, Wife of the Plaintiff *Pullen*, Sister by the Mothers side of the said Testatrix *Ann Nurse*, and the other Plaintiffs, are of the same degrees of Consanguinity, and so are Intituled to their equal shares of her Personal Estate, and the said *Ann Nurse*, made *Ann* the Wife of *William Hodges* Executrix, who died before the said *Ann Nurse*, and the said *Ann Nurse* died without altering of her Will; That after her death, the Defendant *Serjeant* a Relation to the said *Ann Nurse*, took Administration of the said *Ann Nurse*'s Personal Estate.

The Defendant insists, That he being only Brother, and one of the nearest Relations to *Ann Nurse* the Testatrix and her said Executrix dying before she Administred with the Will annexed, and paid Debts and Legacies, and is willing to Distribute

tribute as the Court shall direct, and craves the Direction of the Court, whether the Plaintiffs being of the half blood, shall have equal proportion with the Defendant and others of the whole blood.

This Court declared, That the Plaintiff who are of the half blood to the said *Ann Nurse*, were equally intituled to a Distribution of the said Estate, and to an equal share of the Defendant *Serjeant* and others, who are of the whole blood, and decreed the same accordingly.

They of the half blood, shall have equal share of the Personal Estate, with those of the whole blood.

Keale contra Sutton, 36 Car. 2.
fo. 773.

TH E Defendant being Arrested in the *Marshalls Court*, for matters arising in *Berkshire*, out of the Jurisdiction of that Court. This Court granted a Prohibition, which being Disobeyed, an Attachment was ordered against the Persons Disobeying the same; and the Defendant to proceed upon the same.

A Prohibition granted, for Arresting in the *Marshalls Court*; for matters arising in *Berkshire*.

Carvill contra Carvill, 36 Car. 2.
fo. 142.

THat the Testator *Robert Carvill* by Will, the fifth of *June* 1675. and thereby gave the Plaintiffs several Legacies, and also Legacies to the Defendants, which he

Will

he appointed to be paid by Sale of Lands, after the death of his Sister *Rosamond*, whom with the Defendants, he made Executors, and gave his said Executors (*residium bonorum*) and in 1678. died, and the said *Rosamond* is dead.

Statutes of
Frauds and
Perjuries.

That the Defendant *Robert Carvill* being the Eldest Son of *Henry* the Testators Brother, is his Heir at Law, who insists, That the Testator made no such Will, and that he claims the said Lands by Dissent, or if any such Will was made, the Testator was *non compos* at the making thereof, and that no Person was named in the said Will, to Sell the said Lands, and insists on the Act against Frauds and Perjuries, and Avers, That the Testator died not till 1680. and that he did not make and sign, that Will according to the said Act, there being no Witnesses that have Attested it according to that Act; and doth therefore insist, that the same is void in Law, as to the Devise of Lands, and that the same are come to him as Heir, and he hath since Recovered the same at Law, and insists also, that the said Will is void in Law, because no Person is appointed to make Sale, and being but a voluntary Disposition for payment of Legacies, and not Debts, the Plaintiff ought to have no Relief, to make the same good in Equity to the Disinherison

inherison of the Defendant, the Heir at Law.

But the Plaintiffs insisted, Though the Testator died after the said Act, viz. December 1678. yet the Will was made long before the 24th of June 1677. and so is not within the intention of the said Act, and that though no Person be in express words named to Sell the Lands, yet the Sale ought to be made by his Executors, and the Heir ought to be Compelled to joyn in the Sale.

The Defendant the Heir insisted, That though the Will might be out of the provision of the Act, being made before the making of the Act, yet there is no good proof, that any such Will was made or published by the Testator.

This Court directed it to Law on this Issue, *Devisavit vel non devisavit*, and a Verdict passed for the Plaintiff. Will, or not Will.

This Cause coming to be heard on the equity reserved, and this Court being satisfied with the Verdict which was (viz.) That the said *Robert Carvill* the Testator, did make and publish such Will, and thereby devised the said Lands to be sold as aforesaid.

This

Lands De-
vised to be
sold, and
now ex-
press't to sell
the same,
Executors De-
creed to sell.

This Court upon reading the Will, de-
creed the said Lands to be sold by the said
Executors, and the said Legacies to be
paid thereout, according to the said
Will.

*Norton contra Mascall, 36 Car. 2.
fo. 544.*

A voluntary
Award De-
creed, to be
performed.

THE Suit is to have a voluntary
Award performed, the Defendant
insisted, It being a voluntary Submission of
the parties, and the Reference not dire-
cted by this Court, the Award was void,
and ought not to be performed and de-
murred by the Plaintiffs Will.

The Master of the Rolls ordered Ptes-
dents, and upon reading of the Award,
declared, he saw no Cause to relieve the
Plaintiff, but dismissed the Bill.

This Cause was Re-heard by the Lord
Chancellor *Jefferies*, who declared, he saw
no cause why the said Award should be
impeached; but it was fit that the same
should be performed; being in part ex-
ecuted and assented unto, and decreed
the same to stand confirmed, and the
Defendant to perform the same.

REPORTS OF CASES

Taken and Adjudged in the
COURT of CHANCERY

In the Reign of
King *JAMES II.*

*Attorney General contra Vernon, 1 Jac.2.
fo. 388.*

THE scope of the Information in this Cause being to set aside Letters Patents obtained by the Defendant *Vernon*, in the Names of the Defendants *Browne* and *Boheme*, in nature of a Grant or Contract under the Seal of the Dutchy of *Lancaster*, of the Honour of *Tudbury*
A a and

Information against Patentees of *Needwood* Forest.

Grant obtained per
Surprize.

and Forest of *Needwood*, at a great under-value, wherein his late Majesty was surprized; His Majesties Attorney General by Information setting forth, That his late Majesty being seised in Fee in right of his Crown, as parcel of his Dutchy of *Lancaster*, of the said Honour of *Tudbury*, of the value of 2000 *l. per Annum*, and also of the benefit of *Timber Trees*, Woods, &c. of the value of 30000 *l.* whereon the Defendants commit Wast, pretending Title to the premisses by Grant of the Crown from his late Majesty, whereas such Grant was unusually obtained, and by surprize, for that about *Sept. 1683.* for some small Sum, and getting some interest in Ground at *Sheerness*, to the value of about 500 *l.* and endeavouring to value the Lands at *Sheerness* at 3000 *l.* in *October* following they did prefer a Petition for the said Grant, and obtained a Reference thereof to Sir *Thomas Chickley*, Chancellor of the Dutchy, and hastily obtained a Report in *November*, and within two days after the Report, a Warrant was signed for passing the Grant, though endeavours were used to stop it by Command from his late Majesty, and the Lords of the Treasury, the 19th of the same *November*, and particular Application made to the Chancellor of the Dutchy, he then denying he knew thereof,

of, and it was not known that any Grant was thereof, till the particular thereof was found in a Scriveners Shop about a Month after the passing thereof, contrary to the course of the Dutchy, there being no such Grant yet Registred or Inrolled, to the prejudice of his Majesty, and the Nobility and others, having dependency there, the said Defendant having given untrue Particulars of the most profitable Matters thereof, to the value of some Thousand pounds, wherefore the said Grant ought to be delivered up to be Cancelled.

The Defendant *Vernon* insisted, That the Defendants having long Leases of the said premisses unexpired of a great yearly Rent, and also Offices within the premisses, upon which hath been expended great Sums of Mony in Buildings and Repairs, whereby his Majesties antient Rent hath been much increased; and the Defendant *Vernon* being informed of some endeavours used to obtain the Reversion in Fee of the said premisses, he petitioned his Majesty in September 1683. in the Name of the other Defendant *Browne*, to prevent a Merger of the said Leases, and on the 29th of the said September obtained a Reference to the Chancellor of the Dutchy of Lancaster, and 19 November 1683. the said Chancellor made a Report,

and thereupon 20 Nov. 1683. his Majesty signed a Warrant, dated the 19th of the same Month, authorizing the Chancellor to make a Grant of the premisses: That thereupon the Defendant *Vernon*, by Decree 20 Nov. 1683. between his late Majesty of the one part, and himself on the other did sell unto his Majesty all those 42 Acres in the Isle of *Sheppey*, whereon his Majesty's Fort of *Sheerness* is built: That in consideration thereof, and 7000 *l.* paid by the Defendant for his Majesty's use his said Majesty 21 Nov. granted unto the Defendants *Browne* and *Boheme*, in Trust for the Defendant *Vernon*, all the said premisses.

And the said Defendant *Vernon* insists That the said Patent passed regularly, and is effectual in Law, and ought not to be impeached, the impeachment whereof being in derogation of other his Majesties Grants, and the Consideration is equivalent to the Grant, his Majesties Favour being an Ingredient thereunto, and the premisses mightily over-valued by the Surveyor, and the said Patent was left with a Scrivener, whereon to raise 10000 *l.* but the same was not thought a sufficient Security for such a Sum: That the Defendant *Browne* for 10300 *l.* hath purchased the said premisses of *Vernon*, and insists on the said Grant as good in Law

and is advised that this Court will be tender in examining the Methods of the passing the said Grant, when it hath received the allowance of the proper Officer, by having the Seal affixed to it.

His Majesties Council insisted, That this Information Suit is properly brought in this Court by *English* Bill, to be relieved against the said Grant or Patent, and that no *Scire* *facias* can be brought in the Dutchy, or in this Court for the Reversal thereof, Patent not and if a Bill or Information (as this case Reversible is) should not be admitted, his Majesty *per Scire* would be in a worse condition than any *facias*. of his Subjects, considering the great over-value, and the quick, hasty, and unusual manner of passing the Patent, contrary to all Patents of that nature, it passing neither by Privy Seal, Privy Signet, or any immediate Warrant, but the Chancellor of the Dutchy acted therein in all Capacities, and passed the Grant after Notice and fresh pursuit by his late Majesty for recalling the same, and express Prohibition, that no Mony should be received.

This Court, assisted with several Judges, were all clear of Opinion, That this Suit was proper by *English* Bill, and that the Patent could not be annulled or made void by *Scire facias*, or otherwise, at the

Common Law, and the Bill being to have remedy for his Majesty, against Fraud, Surprize and Deceit, which their Lordships declared was made out, and that the King was most grossly deceived and abused as to the value, and that therefore his Majesty ought to be relieved in this Court or otherwise he would be remediless, and so in a worse condition than any of his Subjects in a case of this Nature; and this Court with the said Judges, taking into consideration the excessive over-value which was offered to be made good by the Surveyor, the surprize and deceit, and the speedy and unusual passing the said Grant, and that no Mony was paid till the Grant was ordered to be stopt, and directions for this prosecution, which was before Livery and Seisin.

Grant and
Inrolment
in the
Dutchy-
Court va-
cated, and
the Patentees
decreed to
Reconvey
to the King.

This Court declared, and was fully satisfied, That in this Case his Majesty ought to be relieved, and the said Grant set aside and made void, and decreed the same accordingly, and the Inrolment thereof in the Dutchy-Court vacated, and the Defendants to procure those in whom the Estate in Law is to Reconvey unto his Majesty, and the Defendants at liberty to apply to his Majesty, for to have the Mony paid back, which was paid to Sir *Thomas Chicheley* and *Cuxton*, as aforesaid.

Beckford contra Beckford, 1 Jac. 2.
fo. 196.

THat *Richard Beckford* Citizen and Freeman of *London*, had several Children, and by his Will in writing after Debts and Funeral Charges paid, appointed one full third part of his Personal Estate to the Plaintiff *Frances Beckford* his Relict, according to the Custom of the City of *London*, and declared that *Frances* and *Elizabeth*, two of his Daughters, had been fully advanced in his life-time, and that *Mary* and *Jane*, two other Daughters had not, and directed they should bring their Portions they had received, into the third part of his Personal Estate, belonging unto his unpreferred Children, and they should have equal shares with his unpreferred Children.

Now the question between the Plaintiff *Frances*, and the unpreferred Children how the said Estate, should be divided by the Custom of *London*, the Plaintiff *Frances* insisting, that the Children not fully Advanced, ought to bring what they had received into the whole Estate, and then she ought to have one full third part of the whole Personal Estate, insisting, That every Widow of a Freeman, ought by the Custom of *London*, to be indowed with

one full third part of the whole Personal Estate.

The unadvanced Children by the Custom of London, to bring in what they had received into Hotch-potch with

This Court declared the Custom to be, That the Testators two Children, *Mary* and *Jane*, who were not fully Advanced, were to bring what they had received into Hotch-potch with the Orphanage thirds, after the Estate is divided into thirds, and not into Hotch potch with the whole Estate, and decreed accordingly.

with the Orphanage thirds, after the Estate is divided into thirds, and not with the whole Estate.

And what hath been received by any one, more than their share and Legacies, is to be Repaid, as the Master shall appoint.

Halliley contra Kirtland, 1 Jac. 2.
fo. 566.

Mortgage.

THAT *John Park* Mortgaged Lands to the Defendant *Kirtland* for 60 l. and was also indebted to the Defendant *Sanderson* 50 l. on Bond, and the said *Kirtland* wanting his money, Assigned the said Mortgage to the said *Sanderson*, so that *Sanderson* on payment to him the money paid to *Kirtland*, on the said Mortgage, and his 50 l. on Bond and Interest, is willing to Reconvey to the Plaintiff, which they refuse to do.

This

This Court in as much as the Estate so vested in the Defendant as aforesaid, is a Chattel Lease, and so liable to debts, and the Defendant having an Assignment of the Mortgage, and his debt on Bond being a just debt, declared, that the Plaintiff ought not to be let in to a Redemption of the said Mortgage, but upon payment of the said 50 l. and interest due on the said Bond, as well as the Mortgage money, and decreed accordingly.

The Plaintiff decreed to pay off a Bond of 50 l. as well as the Mortgage money upon Redemption.

Coltman contra Warr, 1 Jac. 2.
fo. 566.

THis Court would not Rehear a Cause after decree Signed and Inrolled, notwithstanding the said Cause had been opened since the Inrolement, in order to Re-hearing, and discharged the Order for Re-hearing.

No re-hearing after a Decree Signed and Inrolled.

Jones & al' contra Henley, 1 Jac. 2.
fo. 995.

SIR Robert Henley by Will gives 100 l. a piece to all his Servants, which Will is Dated the 10th of November 1680. and Sir Robert lived afterwards till the 7th of August 1681. but made no Republication of the said Will, and the Plaintiffs as Servants to Sir Robert demands 100 l.

Legacies.

apiece Legacy: That these Servants, (*viz.*) *Jones, Clerk, Mecke, Serle, and Hanbury*, were all Menial Servants before the 10th of November 1680. and so continued till the 7th of August 1681. That these Servants, (*viz.*) *Litchfield, Davies, Deacon, Booth, Noon, &c.* were all Servants at the time of his death, but were not in his Service, at the time of making of the Will; that *Cook and Hawkes* were both Servants at the 10th of November 1680. but before the 7th of August 1681. were discharged from his Service: That *William Harrison* was a Menial Servant the 10th of November 1680. but dyed before the 7th of August 1681. That *Castilian Goddard, &c.* were Servants at large, but not Menial, (*viz.*) as Steward and Bailiff before the 10th of November 1680. and so continued till the said 1681. but did not Inhabit in the House: That *Stranger and Long* were Chairmen, and agreed with after the said 1680. at 20 s. per week so.

The Plaintiffs insist, That such that were his Servants at the time of his death, ought to have the benefit of the said Devise.

But the Defendant insisted, That none of the Plaintiffs can be any ways intitled to that benefit, but only such as were Menial Servants, before the publishing of the said Will, and did so continue all along

to be Menial Servants, and live in the House with him, to the time of his death.

This Court declared, that none of the Who are said Plaintiffs, but such as were Servants Servants capable to receive Legacies by the general words of a Will, To all my Servants &c. to the said Sir Robert, before the making the said Will, and did so continue to be Servants to him, until the time of his death, could have any pretence to the said Legacy, and such only as were his Menial Servants, and lived all along in the House with him, from before the 10th of November 1680. until the 7th of August 1681. and no others, and ordered that Jones, Clerk, &c. only, and no other of the Plaintiffs be paid their Legacy of a 100 l. a piece by the said Defendant, and ordered the Bill as to all the other Plaintiffs, to be dismissed.

Fenwick, & al' contra Woodroffe, & al'
1 Jac. 2. fo. 400.

THat Doctor *Smalwood* deceased, by Agreement Deed in 1672, conveys the Land on Marriage and premisses to Trustees and their Heirs, to purchase Lands. to the use of himself for life, Remainder to *Theophania* his Wife for life, Remainder to *Mary* their sole Daughter, and the Heirs of her Body, Remainder to his own right Heirs, with a proviso, That if his said Daughter *Mary*, should then after Marry

Marry in his life time without his privity and consent first had, then all and every the uses and limitations therein mentioned and made should cease and be utterly void, That the said *Mary* did intermarry with Sir *John Lloyd*, in the Doctors life time with his consent, who upon a Settlement made on the said *Mary* was to have 2000 *l.* Portion, 1500 *l.* whereof was to be laid out in Lands for increase of *Marys* Joynture, and that she had Issue by him the Plaintiff *Ann*, That Sir *John Lloyd* died, and the said Dame *Mary* intermarryed with one *Hutchinson*, without the consent, good likeing, or privity of the said Doctor *Smalwood* her Father; That in 1683, the said Doctor *Smalwood* died, having by his Will in 1683, made the Defendant *James Smalwood* and others Executors, and thereby devised and settled his Estate real and personal, (*viz.*) according to his Settlement formerly made, he gave his said Daughter Dame *Mary* all his Lands during her life, if his Executor should so think fit, and in case they should not to his Grandchild *Ann Love*, and in case of failure to his Grandchild, *Theophania Hutchinson* during her life, and in case of failure to his Nephew, the Defendant *James Smalwood* for ever: And his personal Estate, as Money, Books, Plate, &c. to be divided amongst his said Daughters, Grandchildren and Nephew

Nephew *James Smalwood* at the discretion of his Executors, so to have the said 1500 *l.* which rested in Dr. *Smalwoods* Hands, being part of the 2000*l.* Portion, Covenanted by Dr. *Smalwood* to be laid out in Lands by the said Doctor for increase of *Mary's* Joynture aforesaid, to be laid out according to the Doctors Covenants; and to have the benefit of the said Settlement in 1672, is the Plaintiff Bill.

The Defendant *James Smalwood* pleads, and claims a right to the Estate of Doctor *Smalwood* by his *Will*, and by the said Deed of 1672, the said Dame *Mary* having by her Marriage with the said *Hutchinson* in the Doctors life time, without his privity or consent, broke the Condition, by which she was to have enjoyed the Lands in that Settlement, and prays the Judgment of this Court, the Estate being limited to him as aforesaid; And he further pleads and insists, That Dame *Mary* ought not to have any discovery of the Writings of the Doctors Estate, because he the said *James Smalwood*, and the other Defendant *Woodroff* have not yet consented, that she should have any part of the Doctors Estate, which power was given them by the Doctors Will as aforesaid; and whether he and the other Defendant ought to consent as aforesaid, submits to this Court.

But

Lands settled
on a Daugh-
ter provided
she Marry
by consent,
and she Mar-
ries by con-
sent, after
she Marries
a second
Husband
without con-
sent, this
second Mar-
riage is no
breach of
the proviso.

But the Plaintiffs insist, That they ad-
mit such proviso in the Deed of 1672,
that in case the said Dame *Mary* should
Marry in the life time of the Doctor with-
out his privity, consent and liking, then all
and every the Limitations therein should
cease and be void: But insist, That the
Marriage between Sir *John Lloyd* and
Dame *Mary* was concluded by the Doctor
himself, as appears by the said Articles,
and that they married with the Doctors
good liking privity and consent, accord-
ing to the said Condition, and insist,
That Dame *Mary's* second Marriage with
Hutchinson was not without the consent,
privity and good liking of the said Do-
ctor; and insist also, that the said provi-
so by Dame *Mary's* first Marriage was ful-
ly performed, and the Estates in and by
the said Settlement granted, absolutely ve-
sted according to the Limitation declared
and contained, so as the said second Mar-
riage of Dame *Mary* with the said *Hut-*
chinson, if it had been without such con-
sent could not have divested the same,
and therein crave the Judgment of this
Court.

The Court declared, That the first
Marriage of Dame *Mary* being by her Fa-
thers consent, her second Marriage though
it had been without his consent, could be
no breach of the Proviso or Condition in
the

the first Settlement, and decreed the Defendants, the Executors of Doctor *Smalwood* to account for all the personal Estate of the said Doctor, and the Rents and profits of the real Estate, and if personal Estate sufficient after debts to pay the 1500 *l.* then they are to pay the same to the Trustees, which they are to lay out in a purchase of Lands, according to the Deed of the 18 Aug. 1683.

Monies decreed to be laid out in Land, according to Marriage Agreement.

Com' Winchelsey & al' contra Dom' Norcloff & al' 1 Jac. 2. fo. 1026.

THAT *Katherine*, late Countess of *Winchelsey* the Plaintiff the Earls late Wife, had three Husbands Successively, (*viz.*) *Lister* her first Husband, by whom she had Issue, the Defendant *Christopher Lister*, *Sir John Wentworth* her second Husband, by whom she had Issue *Thomas Wentworth*, since deceased, and the Defendant *John Wentworth*, and the Plaintiff the Earl her third Husband, by whom she had Issue the said Lady *Catherine*, and the Plaintiff the Lady *Elizabeth*: That the said *Wentworth* had a Real Estate by descent from his Father, out of which, after his Fathers death, there was payable to, or to the use of the said *Thomas*, several Sums of money, for Rents, Fines and Profits. That in 1684. the said *Thomas* died

Act of Parliament for the Settlement of Intestates Estates.

died Intestate, leaving no Wife or Child, but leaving the Defendant *Christopher Lister*, *John Wentworth*, the Lady *Katherine*, and the Plaintiff the Lady *Elizabeth*, his Brothers and Sisters, who being the next of Kin, in equal degree (his Mother the said Countess dying in his lifetime) they by Virtue of the late Act of Parliament, for selling Intestate Estates, became Intituled to the surplus of the said *Thomas*, his Personal Estate to be equally distributed, and divided amongst them, (*viz.*) to each of them a fourth part thereof; that before any Distribution made, the Lady *Katherine* died Intestate, and Administration of her Estate was granted to the Plaintiff the Earl her Father, who by Virtue thereof, and of the said Act of Parliament, ought to have the said Lady *Katherines* fourth part of the said Personal Estate of the said *Thomas Wentworth* her Brother, and the Plaintiff the Lady *Elizabeth*, ought to have another fourth part; but the Defendants pretend that part of the said *Thomas* his Personal Estate, was in his Life-time Invested in the purchase of Lands, which were Conveyed to him and his Heirs, and ought to Discend to the said *John Wentworth*, as his Brother and Heir, and the said money ought to be accounted as part of his Personal Estate, whereas if any such Purchase were made,

the

the same were without his Consent, and during his Minority, when he had no power to direct the laying out thereof, and the Lands in Equity, ought to be accounted part of his personal Estate, of which the Plaintiff seeks to have their shares.

The Defendants insist, That the Defendant *John Wentworth* only was of the whole Blood, the rest being but of the half blood to him only, and leaving the Defendant Dame *Dorothy* his Grandmother, by the Mothers side (*viz.*) Mother of the said Countess, who conceives her self to be Intituled as Grandmother to an equal share with any of his Brothers and Sisters; and insists, That the said Lady *Katherine* dying within less than a year after the Intestate *Thomas Wentworth*, she was not by the said Statute, Intituled to any share of the said Personal Estate, her supposed Right being merely a thing in possibility and Expectation, which vanished by her death within the year: And the Defendants insist, That the Countess before her Marriage with the Plaintiff the Earl (*viz.*) in 1673. granted Lands to Trustees for 21 years, if she so long lived in Trust out of those Lands, and other Lands late of Sir *John Wentworth*, to pay her 200 *l. per Annum*, till the said *Thomas* was 12 years of Age, for his Maintenance, and after till

21, so much as the said Trustees thought fit, and the Residue for the benefit of the said *Thomas*, his Heirs and Assigns : That the said Defendants with the Countesses Approbation out of the moneys arising by the said Trust, made several Purchases in their own Names, and declared the Trust thereof for the said *Thomas Wentworth* and his Heirs; and the Defendant Dame *Dorothy* made other Purchases in her own Name, with the said *Thomas* his momey, which she received in Trust for him, and insists, that those moneys so invested in those Purchases in the life-time of the said *Thomas* in Trust, are not, nor at his death were any part of his Personal Estate, but the Lands descend to the Defendant *John Wentworth*, as his Heir.

That Sir *John Wentworth* died in 1671. and left a great Personal Estate, which came to the Earl and Countess on their Marriage, and that Sir *John Wentworth* died Intestate within the Province of York, the Defendant *John Wentworth* being his younger Son unpreferred, became Intituled to a third part of his Estate, equally with his Widow, by the Custom of that Province, and by force of the said Act, for settling Intestate Estates, *Thomas* and *John* became Intituled with her to the other third part. •

The Defendants farther insist, That the
said

said Earl is not, nor can be Intituled to any share of the said *Thomas Wentworths* Personal Estate; for that the Act of Parliament is only Authoritative and directive to the Ordinary and Administrator, and there are no vesting words therein, whereby to Intitle the Lady *Katherine* to a share of the Estate, and that she dying before any distribution, and within the 12 Months, allowed to that purpose, her share fell among her Surviving Brothers and Sisters, and however, if she was Intituled to any part, it could only be to a half share, she being but of the half blood to the deceased, and that so in the Course of the Civil Law.

But the Plaintiffs insisted, That though The said the Act of Parliament be only Authoritative and directive to the Judge, and yet such Authority and direction in an Act of Parliament, doth by Judgment and Implication of Law, vest an Interest in the Wife, Children and Kindred, for whose benefit the Act was made, as much as if it had been a bequest of *residuum bonorum*, for that the Act appoints all Ordinaries whatsoever, on granting any Administration to take the Bond prescribed thereby, one Clause of the Condition whereof is, to pay the surplus that shall be found due on such Administration, account to such Person or Persons, as the Judge by his Decree

cree or Sentence to that Act shall limit and appoint, and then appoints the Ordinaries and Judges respectively, to order and make just and equal distribution of such surplus amongst the Wife, Children or next of Kin, according to the Rules and Limitations therein, and the same to Decree and settle, (which is the very Title of that Act) and that tho' there be Twelve months time given for distribution, yet that is only with respect to Creditors, and no way hinders the vesting the surplus in such persons, as are appointed to have it immediately upon the Trustees death; any more then a Legacy to be paid *in futuro*, and that it is generally a much longer time before an Intestates Estate can be got in, and the surplus known, and if the Executors or Administrators of persons dying, in the mean time shall lose their shares, it will elude the intent of the Act of Parliament, which was made for the benefit of the Wife and Children, and Kindred generally: And it will lye much in the power of an Administrator, by retarding his Account, to prevent another of his share; nay it will be mischevous to the Administrator, and those who shall claim distribution, for that if no Interest be vested in any before an actual distribution, by Decree or Sentence, then no distribution can be by Agreement

or

or Consent of the Parties; nor let the occasions or necessities of any claiming distribution be never so great, can any Administrator satisfie the payment of any part of the Estate, till such Sentence or Decree made, which the Law makes could never intend: and if no Interest be vested by that Act, then hath this Court no Jurisdiction to intermeddle therewith; for that the Act only directs the Ecclesiastical Judge, to make a Decree or Sentence for distribution, but the same vesting an Interest, and there being no Negative Words, that a distribution shall be sued for there and elsewhere, several distributions have been made in this Court, as well in the Lord Chancellor *Finch* his time, and the Lord Keeper *North's* time as since, and that the same is looked upon as a Point settled, and that it is the constant course of the Ecclesiastical Courts, to Decree the shares of any persons dying, before distribution to the Executors or Administrators of such persons so dying, and not to the Surviving person claiming distribution; and this Act was intended as the Will of every Intestate, and the Wife, Children and Kindred respectively, to be as well intituled, as if the Intestate had made a Will, and so Bequeathed the same amongst them, and for the half Blood and whole Blood, the same hath made no

distribution between them, but appointed the distribution to be equal, and that for the Monies alleadged to be invested in Lands, such Purchases do not alter the nature of the Case, for that *Thomas* being a Minor, could not give Authority or Consent for it; and he might have disceded to it when at Age, and dying in Minority the same still remains, part of his personal Estate, and the Land is but in the nature of a Mortgage, or additional Security for it.

This Court declared, they saw no cause or colour to Decree any share for the Defendant Dame *Dorothy*, and conceives her no way intituled to any, but as to the Plaintiff the Lord *Winchelsey*. This Court declared they were fully satisfied, that the said Act of Parliament doth immediately upon the death of an Intestate, and before any actual distribution made; vest an Interest in the respective persons appointed to have distribution of the surplus of his Estate, as much as if it had been Bequeathed by Will, and that if any one of them dye before distribution, tho' within the year, yet the part or share of such person so dying, ought to go over to the Executors or Administrators of such party so dying, and not to the Survivor, or next of Kindred to the first Intestate, and that the Lady *Katherine* was at her death well

If any of the next Kindred before distribution, that share shall go to her, or his Executors or Administrators, and not to the Survivor, next of Kindred to the first Intestate.

well intituled, to a share of her Brother *Thomas Wentworths* Estate, as an Interest thereby vested in her, notwithstanding she died within a year after the Intestate, and before any distribution made, and that the Lord *Winchelsey* as her Administrator is now well intituled therto, and decreed a distribution, and the Plaintiff the Lord *Winchelsey* shall have the Lady *Katherines* share, and proportion of the said *Thomas Wentworths* Estate accordingly, and the Plaintiff the Lady *Elizabeth*, shall have a like share thereof with the Defendant *Lister*, and *John Wentworth*.

2 Jac. 2. fo. 315. The question being, Whether the respective shares of the Plaintiff and Defendant *Lister*, (the said Lady *Katherine* and *Elizabeth*, and the Defendant *Lister* being only of the half Blood to the Intestate;) and whether the Mony be vested in Lands, or the Lands themselves should be accounted part of the personal Estate of the said *Thomas Wentworth* or not? His Lordship ordered a Case to be made as to those two points.

The Case being, (*viz*) That the said *Thomas Wentworth* died an Infant and unmarried, leaving such Brother of the whole Blood, and such Brother and Sisters of the half Blood as aforesaid, who were his next of Kindred in equal degree, and

that upon his death a real Estate of near 2500 *l. per Annum*, descended to the Defendant *John Wentworth*, his Brother and Heir, and that above 3000 *l.* of the profits of that Estate, received in the Intestates life time by Dame *Dorothy Norcliff*, and the said Trustees which belonged to him and his proper Monies, were by them during his Non age, and without any direction or power in their Trust, but of their own Heads laid out in Purchases in Fee, and Conveyances in their Names, but in Trust for the said Intestates and his Heirs, with this expresse Clause in the said Conveyances, (*viz.*) in case he at his full Age would accept the same at the Rate purchased, the purchase being made with his Mony, and for his advantage.

Half Blood
to have an
equal share
with the
whole Blood.

This Court as to the said two Points, being assisted with Judges, declared, That the Plaintiff and the Defendant *Lister*, ought each of them, to have an equal share with the Defendant *John Wentworth*, of the surplus of the personal Estate of the said Intestate, and the distribution thereof ought to be made among them share and share alike, and decreed accordingly.

And

And as to the other Point declared, Trustees That the Monies laid out in the said Purchases ought to be taken and accounted for as part of the said personal Estate, and distributed with the rest, and decreed a Sale of the said purchased premisses, and distribution thereof to be made as afore-
lay out the Monies of an Infant in Lands in Fee. This shall be accounted part of his personal Estate, he dying a Minor.

Dom' Middleton contra Middleton, 1 Jac.2. fo. 793.

THAT Sir Thomas Middleton upon his Devise. Marriage with the Plaintiff Dame *Charlotta Middleton*, settled a great part of his Estate in *Com' Flint*, and other Countries for her Joynture, being seised in Fee of Lands in several Counties (*viz.*) *Flint, Denbigh, and Merioneth*, and settled all his Estate on his first and other Sons on her Body in Tail Male, and charged the same with several Terms of years, for raising Portions for Daughters (*viz.*) If one Daughter and no Issue male, 8000 l. and out of his personal Estate, intending to make an addition to the Portion of the Plaintiff *Charlotta* his only Child, and to increase the Plaintiff Dame *Charlotta's* Fortune and Joynture, made his Will in 1678. and thereby reciting that whereas upon his Marriage-Settlement it was provided, That if he should have a Daughter she

he was to have 6000 *l.* Portion, as his Will was, and he gave to his only Daughter *Charlotta*, in case she should have no Son living at his death, 10000 *l.* more as an addition to her Portion, to make her up the same 16000 *l.* and for raising of the said portions, and payment of his debts and Legacies, he devised all his said Lands (except his Lands limited for his Wives Joynture for her life) unto Trustees and their Heirs in Trust, to raise out of the Rents and profits of the said premisses, the several Sums mentioned for his Daughters portion, and the sums of Money thereafter mentioned, and Willed, That till one half of the said Daughters portion should be raised, his Daughter *Charlotta* to have 100 *l.* per Annum for the first four years, and afterwards 200 *l.* per Annum till her moiety of her portion should be raised; and after payment of the said portions, maintenance, debts and legacies, he devised the said Trustees to stand seised of all the said premisses (except before excepted) to the use of the Heirs males of his Body, with a Remainder to the Defendant *Sir Richard Middleton* his Brother for life, without impeachment of Waste, Remainder to his first Son and Heirs males of his Body, with other Remainder to the Defendants *Thomas, Richard and Charles Middleton*, Remainder to the

right

right Heirs of the said *Thomas*, and he bequeathed to his said Daughter *Charlotta* the Plaintiff his Diamond-pendants, which his Wife wore, and bequeathed to his Wife Dame *Charlotta*, after his death, one Annuity of 200 *l. per Annum* for her life, to be raised out of the profits of the said premisses, and bequeathed the great Silver Candlesticks to go according to his Grandmothers Will, to the Heirs of his Family, with his Estate as an Heir Loom, and bequeathed the use of all his Goods, Stock and Householdstuff to his Wife the Plaintiff Dame *Charlotta*, for so long as she should live at *Chirke Castle*, and from thence he left the same to his eldest Son and Heirs, or such as should be Heir male of his Family, according to the limitations aforesaid; and his further Will was, that his said Wife should have such proportion of the Goods, Householdstuff and Stock, for the stocking and furnishing of *Cardigan-House* and Demean, being part of her Joynture, as should be judged fit by her Trustees, that she might be supplied with Goods and Stock requisite for her House, and left to whomsoever should be his Heir all his Stable of Horses, and made the Plaintiff Dame *Charlotta* Executrix, and died in 1683. leaving the Plaintiff *Charlotta* his Daughter and Heir.

The

The Defendant Sir Richard Middleton insisted, That Sir Thomas Middleton his Brother had, in Consideration of 184 l. to him paid in 1680. conveyed to the said Defendant and his Heirs two Messuages, being 11 l. 10 s. *per Annum* in Com^y Denbigh, and taking notice that the same was comprized in his Wives Joynture, declared he would leave or give his Wife by Will, or otherwise, a sufficient compensation for the same, so that he should not be Troubled. And the Defendant insists, That the 200 l. *per Annum* given her by the Will, was intended to be as a Compensation; and insists, That Sir Thomas intended his Daughter more than 16000 l. and that such part of the personal Estate as was not specifically devised to his Executrix, which was all he intended her, ought to be applied towards satisfaction of the Testators debts and legacies, and the Plaintiffs Portion, and the rather, for that by the true Construction of the Will the real Estate is subjected only supplementarily, and that part of the personal Estate intended to the Executrix is specifically devised to her, the Devise of the Goods and Stock were only intended, in case the Plaintiff Dame Charlotta should live on her Joynture; but she not residing on her Joynture, he insists, she is not Intituled to the said Stock

Real Estate
subjected to
pay Debts
only supple-
mentarily.

Stock and Goods, and as to all other the Goods and Stock, and Furniture, the Defendant was well Intituled by the Will, as Heir male of the Family, according to the limitation of the Will.

The Plaintiff insists, That the personal Estate not being devised for payment of of debts, and provision being made for payment thereof out of the real Estate, doth submit to the Court, Whether the personal Estate ought to be applied for debts and legacies, the real Estate being sufficient to do the same; and whether, if she be compelled to pay the debts and legacies therewith, she shall not be reimbursed out of the real Estate.

The Questions arising upon the said Will, and now debated, are (*viz.*

First, Whether the personal Estate, not specifically devised, ought to come in Aid of the real Estate, and be subject to the debts and legacies chargeable thereon?

Secondly, Whether the Plaintiff *Charlotte* ought to have any greater Portion by the Settlement and Will than 16000 *l.* and whether she ought to have the several yearly Maintenances given by the said Deed and Will, and to what time and times, and whether the Stable of Horses did not belong unto her, as being given to whomsoever shall be the Testator's Heir, she being the Testator's Heir?

Thirdly,

Thirdly, Whether the Plaintiff, the Lady *Charlotta Middleton* ought not, besides her Joynture, to have her Annuity of 200 *l. per Annum*, and to have Furniture and Stock for her Joynture, House and Lands, and to have the Jewels and Chamber plate, and Furniture of her Chamber as her *Paraphanalia*.

This Court declared, it was intended the Daughter should have only 16000 *l.* Portion, and that such of the Goods and Stock, and Household-stuff at *Chirke Castle*, which were devised to the Defendant, Sir *Richard Middleton*, did belong, and ought to be enjoyed by the said Sir *Richard*, and that the personal Estate not specifically devised away, and which is not to be set out to the Plaintiff, the Lady *Middleton*, pursuant to the said Will, ought to be applied, and paid towards payment of the Debts and Legacies, and the Portion of the Daughter; and that the Plaintiff the Lady *Middleton* (besides her Joynture, which she ought to enjoy free from Incumbrances) ought to have and enjoy the said Annuity of 200 *l. per Annum*, and Arrears given and devised to her by the said Testator, and that she ought to have her *Paraphanalia*, and proportion of the Goods, Household stuff and Stock, for furnishing and stocking her Joynture-house, and Demeasns to be set out by the Trustees

Personal Estate not specifically devised to be applied to payment of debts, and the Real Estate not subjected thereto.

Annuity in Augmentation of a Joynture.

stees, according to the Will; and the Daughter to have both the Maintenances by Will and Deed of Settlement, and the Stable of Horses, and all things specifically devised to her by the Will, and decreed accordingly.

Whitmore contra Weld, 1 Jac. 2.
fo. 106.

THAT *William Whitmore* deceased in 1675. by his Will, devised to the Earl of *Craven*, for the use of *William Whitmore* his Son, the Plaintiff *Frances Whitmores* late Husband, all the surplusage of his personal Estate, and made his Son *William Whitmore* Executor, and the said Earl of *Craven* his Executor, during the Minority of his said Son, and the said *William* the Father died, and left a personal Estate of 40000 *l.* that *William* the Son at his Fathers death, being but of the Age of 13 years, the said Earl proved his Fathers Will, and possessed all the personal Estate, and the said *William* the Son, having attained the Age of 18 years, not having proved the said Will, and being Intituled to the surplus of the said personal Estate in 1684. made his Will, and thereby devised to the Plaintiff *Frances*, all his personal Estate, and whatsoever lay in his power to give, and made her his

his Executrix, and died in 1684. and the Plaintiff *Frances* being of the Age of 18 years, proved his Will, and is thereby Intituled to the personal Estate of *William* the Father.

But the Defendants, one of them being Sister of *William* the Father, and the other the Children and Grandchildren of the Sisters of the said *William Whitmore* the Father, pretend the surplus of the personal Estate of *William* the Father, belongs to them.

The said *William Whitmore* the Fathers Will is in these words, (*viz.*) *The Surplus of my Personal Estate, my Debts, Legacies and Funeral paid and satisfied, I give to the Right Honourable William Earl of Craven, for the use of my only Son William Whitmore, and his Heirs lawfully descended from his Body, and for the use of the Issue Male, and Issue Female, descended from the Bodies of my Sisters, Elizabeth Weld deceased, Margaret Kemesh, and Ann Robinson, in Case that my only Son William Whitmore should decease in his Minority, without having Issue lawfully descended from his Body: I Nominate and appoint my only Son William Whitmore, Executor of my last Will and Testament. I nominate and appoint the Earl of Craven during the Minority of my only Son Willis*
am

am Whitmore , *Executor of my last Will and Testament.*

The Defendant Dame *Ann Robinson* insists, she is the Surviving Sister of *William Whitmore* the elder, and so is Intituled to the Administration of *William* the Elder , unadministred by *William* the younger, and the Defendant Sir *John Robinson*, and others the younger Children of the said Dame *Ann Robinson* insist; That they are instituted (by *William* the Fathers Will) to an equal share of the surplus of the personal Estate of *William* the Elder, the rather, for that *William* the Elder, made a Settlement of his Real Estate on Trustees, and thereby made a provision for the Maintenance of *William* the younger , during his Minority, and therefore they opposed the Plaintiff *Frances*, getting Administration of *William* the Elder.

The said Plaintiff *Frances Whitmore* insisted, That by the Will of *William* the Elder , there was no joynt devise made to the said *William* the Son, and the Issue Male and Female of the Sisters of *William* the Father; but a several devise to *William* the Son, with Remainder to the Sisters Issue, and that the said *William* the Son having an Interest vested in him by the Will of his Father, and being 18 years Old when he died, and he having then a power to have proved his Fathers

Will, the Earls Executorship during his Minority being determined, might have spent or given away the said Estate in his life-time, he might surely give away the same by his Will, which he having done to the Plaintiff *Frances*, she is thereby well Intituled to the same, and that the remainder over to Issue Male and Female of the Sisters, the Estate being purely personal, is absolutely void.

Devisee Infant lived to 18 years, and makes his Will and Executors and dies, the Executor shall have the Legacy, for that an Interest was vested in the Infant.

This Court hearing several Presidents quoted, declared, That by the Will of the Father, there was an Interest vested in *William* the Son, and the remainder over to the Issue Male and Female of the Sisters of *William* the Elder, was void; and that *William* the Son living to 18 years, and making his Will as aforesaid, and the Plaintiff *Frances* his Executrix, she is thereby well intituled to the surplus of the said personal Estate, and decreed the same accordingly.

Whitlock contra Marriot, 1 Jac. 2. fo. 700.

Defendant ordered to pay the Plaintiff 100 l. for putting in a Scandalous Answer.

THIS Case being upon a Scandalous Answer, His Lordship declared the said Answer to be very Scandalous and Impertinent, and that the expressions taken by the Defendant to the Masters Report, were not only more scandalous, but also Malicious; and that it appearing that *Ry-ley*

ley the Defendants Solicitor, had put Mr. Lynn a Councillors Hand to the Exceptions, without his Knowledge. This Court Ordered the said Ryley to be taken into Custody of the Messenger, and declared, the Answer and Exceptions were not pertinent to the Cause, but meerly to defame the Plaintiff, His Lordship Ordered the Defendant Marriot to pay to the Plaintiff 100 l. for his Reparation and Costs, for the abuse and scandal aforesaid, and the said Ryley to pay 20 l. and to stand committed to the Prison of the Fleet, till payment thereof be made.

Ass contra Rogle, and the Dean and Chapter of St. Pauls, 1 Jac. 2. fo. 154.

THis Case is upon a Demurrer, the Plaintiffs Bill is to inforce the Defendant the Lord of the Mannour of Barnes in Surrey, to receive the Plaintiffs Petition or Bill, in the Nature of a Writ of false Judgment to Reverse a Common Recovery, suffered of some Copyhold Lands in the Mannour by Susan Rogle Widow, which the Defendant Rogle holds under the said Recovery, the Bill setting forth, that Katherine Ferrers by the Will of her Husband, or by some other good Conveyance, was seized in Fee of Free and Copyhold Lands in Barnes, formerly her said

Bill to en-
force the
Lord of a
Mannour to
receive a
Petition in
nature of a
Writ of false
Judgment to
Reverse a
common Re-
covery, de-
murred to,
and the de-
murrer al-
lowed.

Husbands in Trust, to Convey 200 l. a year thereof upon *William Ferrers*, her Eldest Son, and the said *Susan* his then Wife, and Heirs Males of the Body of *William*, Remainder in Tail to *Thomas Ferrers* the Plaintiffs Father, second Son of *Katherine*, and the Heirs of his Body; *Edward* being obliged by Articles, upon *Susans* Marriage with his Son *William*, to settle Lands of that value on *Susan*, for her Joynture: That *Katherine* on that Trust in 1642. surrendred the premisses to the value of 100 l. per Annum, to the use of the said *William* and *Susan*, and the Heirs of their two Bodies begotten, remainder to the Right Heirs of *William*, which was a Breach of the Trust in *Katherine*, in limiting an Estate Tail to *Susan*, when it should have been but an Estate for life: That *William* died before the Admittance, leaving Issue only his Son *William*, and in 1652. *Susan* surrendred to one *Mitchell*, against whom the Common Recovery in question was then obtained, wherein one *Walter* was Demandant, the said *Mitchell* Tenant, and *Susan* Vouchee, to the use of her self, the said *Susan* for life, the Remainder to *William Ferrers*, and the Heirs of his Body, the Remainder to the Right Heirs of the Survivor of them, the said *Susan* and *William* her Son: That *William* the Son died soon after, and *Susan*

san died in 1684. and the Plaintiffs Father *Thomas*, being dead without Issue Male, in case the Common Recovery had not been suffered, the premisses would have come to the Plaintiff, being the youngest Daughter to her Father, as Couzen and Heir both of *William Ferrers* the Father, and *William* the Son, the premisses being Burrough-English, and so the Plaintiff was well Intituled to prosecute the Lord of the Mannour in the Nature of a Writ of False Judgment, to Reverse the said Recovery, wherein there are manifest Errors and Defaults; but the said Lord refuses to receive the said Petition, and combine with the Defendant *Rogle*, who is Son and Heir of the said *Susan*, by a second Husband, who pretends, that his Mother *Susan* surviving her Son *William Ferrers*, the premisses are descended to him by virtue of the use of the said Recovery, limited to the Right Heirs of the Survivor, of *Susan* and her Son *William*, so the Plaintiffs Bill is to examine the defects of the said Recovery.

The Defendants demur, for that the Relief sought by the Bill, is of a strange and unpresidented Nature, being to avoid and reverse a Common Recovery, had in the said Mannour 30 years ago, and that upon a bare Suggestion generally, that the Recovery is erroneous, without in-

standing wherein, which may be said in any case.

The Master of the *Rolls* declared, That as that part of the Bill which seeks to impeach or reverse the said Recovery for any errors or defects therein, or compel the said Lord to receive any Petition for reversal thereof, or any ways to impeach the same, his Honour declared, That this Court being the proper Court to supply the defects in Common Assurances, and rather to support, than to assist the avoiding or defeating of them, and there being no presidents of such a Bill as this is, he thought not fit to admit of this, nor to introduce so dangerous a president, whereby a multitude of Settlements and Estates, depending on Common Recoveries, suffered in Copyhold Courts for valuable Considerations, would be avoided and defeated through the negligence or unskilfulness of Clerks, and therefore conceived the said Common Recovery ought not to be shaken; yet nevertheless the Case being new and great, referred it to the Opinion and Determination of the Lord Chancellor.

His Lordship held the Demurrer good, and Order to stand.

Skinner contra Kilby, 2 Jac. 2.
10. 72.

THE Bill is to have the benefit of a Will.
Bequest by the Will of *Robert Kilby*. The Will being (*viz.*) If my Son *Richard Kilby* should behave himself towardsly, and undertake the payment of my debts and Legacies, then he to have all my Lands in *Tredington*; if he behave himself otherwise, or to neglect to pay my debts and Legacies as aforesaid, then he to have but 5 s. and left it to the direction of his Executrix *Jane Kilby*, the Defendants Mother, and also Mother of the said *Richard Kilby*, the Plaintiffs Father.
The Son Devisee of Lands upon good behaviour, for his misbehaviour decreed against him.

That the said *Richard* waving the said Devise made to him, and neglecting the payment of his said Fathers debts and Legacies, the said *Jane* undertok and paid the same, being intituled by the said Will, and by her Will Bequeathed to the said Defendant the premisses.

This Court upon reading the said Will of *Robert Kilby* the Testator, which being as is aforesaid declared, that according to the said Will, the said *Jane* was well intituled to the premisses, and that the Defendant ought to enjoy the same, and could not relieve the Plaintiff but dismiss the Bill.

Nayler contra Stode, 2 Jac. 2.
fo. 473.

Surrender of
a Copyhold
by an Infant
of 5 years
of Age.

THe Surrender of a Copyhold Estate by an Infant of 4 or 5 years of Age allowed of by this Court: Yet the Lord of the Mannor insisted, he never heard of any admittance in that Mannor at such an Age.

Cloberry contra Lymonds, 2 Jac. 2.
fo. 1069.

Upon the
buying the
Equity of
Redemption
of Lands
in Extent.
Account de-
creed from
the time of
the purchase.

LAnds extended in 1 Car. 1. and held in Extent, and a Bill exhibited to redeem, and being not redeemed, the Bill dismissed in 16 Car. 1. and afterwards he who had the Extent by virtue of the said dismissal, sold the said premisses to the Defendant: But the Plaintiff having since bought the Equity of Redemption, seeks a Redemption.

This Court notwithstanding the dismissal and length of time, ordered an account from the time of the Purchase, but no account from any time before, but the profits to go against the Interest to that time.

Newte

Newte contra Foot , 2 Jac. 2.
fo.695.

THe Defendant insists, That the Depositions in this Cause are irregularly taken, and ought to be suppressed, because the for that Mr. *Samuel Underwood*, who was Solicitors Clerk in the Cause, did write as Clerk in Execution of the said Commission under the said Commissioners, and the said *Underwood* confessed the same and solicited the Matter; for which Reasons the Defendants Commissioners refused to joyn in the Execution of the said Commission, it being of great mischief, for Solicitors or their Clerks to be privy to the taking of Depositions, in such Causes as they Solicite.

This Court was well satisfied, that the said Depositions were (for the Reasons aforesaid) irregularly taken, and doth order that the same be hereby suppressed, and that the Six Clerks Certificate for the regular taking of the Depositions be discharged.

Griffith

*Griffith & al' contra Jones & al', 2 Jac.2.
fo.353.*

Will.

That *Peter Griffith* being seised in Fee of Lands, and posselt of a personal Estate of 20000 *l.* in 1681. by his Will, devised to his Brother the Plaintiff 200 *l.* to the Plaintiff *Shonnet Price*, and *Dorothy Parry*, the Daughters of his Sister *Shonnet* 150 *l.* apiece, &c. and to the Sons and Daughters of his Brother and Sisters (not mentioned by name in his Will) 10000 *l.* equally between them, which said Legacy doth belong to the Plaintiffs *John Lloyd*, and *Alice Williams* being the only Nephew and Neece not named in the Will, and the overplus of his Estate, he obliged the Executors should pay and distribute amongst his Brothers and Sisters Children and Grandchildren, and the rest of his poor Kindred according to his Executors discretions, and the Plaintiff claims the overplus of the said Estate, as being all the Brothers and Sisters Children, and Grandchildren of the Testator, and poor Kindred that can take by the Will.

The Defendants, the Executors insisted, That they conceive the distributing and apportioning the said surplus is left to them by the expresse words of the Will, and that they ought to distinguish the
Grand-

Grandchildren, of the Testators Brothers and Sisters, whose Fathers and Mothers were dead before the Testator, and had no particular Legacies by the Will, and consider the Condition and number of Children of the said Kindred, and give most to those that most want, and conceived that such of the Plaintiffs as have particular Legacies, ought to have but a small one, if any part of the surplus, and the Defendants crave the directions of this Court, how far the words (*Poor Kindred*) shall Extend, to what Degree of Relation.

This Court decreed, That the surplus Legacies to of the said Estate, be distributed to and (*Poor Kindred*) how amongst the Testators Brothers and Sisters Children, and Grandchildren, and as far to be to the rest of the poor Kindred, according extended. to the Act of Parliament, for distributing Intestates Estates, and no further, and to be distributed in such shares and proportions, as the Executors in their discretions should think fit; and whereas there are debts owing to the Testators Estate, and the debtors poor, but propose to pay as far as they are able.

This Court decreed, That the Executors be at liberty to compound any debt owing to the said Estate, if they should think fit. Poor Debtors to the Testator, who left a great Estate; the Executors left at liberty to compound any debt.
Creditors

Creditors on
Judgment,
and Bonds
decreed, to
redeem
Mortgages.

Creditors on Judgments and Bonds
decreed, to redeem Mortgages to-
wards satisfaction of their debts, fo.
843.

Bernry contra Pitt, 2 Jac. 2.
fo. 373.

THe Bill is, That the Plaintiffs Father being only Tenant for life of a real Estate, which after his death would come to the Plaintiff, and the Plaintiffs Father allowing the Plaintiff but a small subsistence, and the Plaintiff borrowed of the Defendant 1000 *l.* in 1675, and entred into Judgment of 5000 *l.* Defezanced for the payment of 2500 *l.* after the Plaintiffs Fathers death, which hapned in 1679.

The Defendant insists, That he lent the Plaintiff 1000 *l.* for which the Plaintiff gave Bond, and Warrant of Attorney to confess Judgment to the Defendant of 5000 *l.* which was Defezanced, that in case the Plaintiff should out-live his Father, and in one Month after his Fathers death pay the Defendant 2500 *l.* and if the Plaintiff should Marry in his Fathers life time, then he should from such Marriage during his Fathers life pay the Defendant Interest for the 2500 *l.* And the Defendant insists, That if the said Plaintiff

Plaintiff dyed before his Father, the Defendant had lost all his Mony: This Cause being first heard by my Lord *Finch*, 9 Feb. 33 Car. 2. who then upon reading the said Defezance declared, That as this Cause was, he could not releive the Plaintiff otherwise then against the penalty, and decreed the Plaintiff to pay to the Defendant 2500 l. with Interest.

This Cause was Re-heard by my Lord Chancellor *Jeffreys*, the Plaintiff insisted, That he had by order of this Court 5300 l. upon the said Judgment, and that the late Lord Chancellor and Lord Keeper, had frequently releived against such fraudulent and corrupt bargains, made by Heirs in their Fathers life time, and that there was not any real difference where the contract is for Mony, and where it is for Goods.

This Court on reading the Defezance The Heir declared it fully appeared, That these Bar- relieved a-
gains were corrupt and fraudulent, and gainst a con-
tended to the destruction of Heirs, sent hi- contingent
ther for Education, and to the utter Ruin contract,
of Families, and as there were new Frauds made in his
and subtle contrivances for the carrying Fathers life
them on; so the relief of this Court ought to time because
be extended to meet with, and correct such it seemed un-
corrupt Bargains, and unconscionable pra- able.
ctices, and decreed the former order to
be discharged, and the Plaintiff to be re-
stored

stored to what he hath paid over , and besides the Principal Mony and Interest.

Durston contra Sandys , 2 Jac. 2.
fo. 108.

The Parson
relieved
against a
Bond given
for Relig-
nation.

THAT the Defendant being Patron of the Rectory of *Messenden in Com' Gloucester*, and the former Incumbent having Resigned the same, the Defendant told the Plaintiff, he would present him to the said Rectory worth about 100 *l. per Annum*, and the Plaintiff coming to the Defendant for the said Presentation, the Defendant drew a Bond of 300 *l.* penalty, with Condition, That the Plaintiff should resign the said Rectory at any time within six Months Notice, which the Plaintiff sealed, and thereupon the Plaintiff was Instituted and Inducted, and was ever since a constant Resident on the place, and hath been at charge of Repairs, and the Plaintiff demanded Tithes of the Defendant, who refuses to pay the same, but gave the Plaintiff Notice to resign, who Resigned the said Rectory into the Hands of the Bishop of *Gloucester*; but the Bishop refused to accept the said Resignation, and ordered the Plaintiff to continue to serve the Cure, declaring, That he would never countenance such Unjust practices of the Defendant, but ordered his Register

to enter it as an Act of Court: That the Plaintiff had tendred his Resignation, and that the said Bishop had rejected it: That the Defendant Arrested the Plaintiff on the said Bond for not Resigning; so to be relieved against the said Bond is the Plaintiffs Suit.

The Defendant insisted, That the Plaintiff demanded more than his just due for Tithes, whereupon the Defendant refused payment, and that the Defendant requesting the Plaintiff to resign according to the Condition of the said Bond, the Defendant Arrested him, which he hopes is Just for him to do, and that this Court will not hinder the prosecution, and that the Plaintiff hath no colour of Relief in this Court against the said Bond; and insist, That the Reason of his Arresting the Plaintiff on the said Bond was his Non-residence and litigious Carriage to the Parishioners.

This Court declared, That such Bonds taken by Patrons from their Clerks, to Resign at pleasure may be good in Law, yet ought to be enjoined and damned in Equity whensoever they are used to any ill purposes: And the Defendant making ill use of the said Bond, his Lordship decreed, That a perpetual Injunction be awarded against the Defendant, to stay proceeding at Law upon the said Bond.

Knight

*Knight contra Atkyns, 2 Jac. 2.
fo. 604.*

Marriage Agreement to have Monies laid out in Lands for a Joynture to such uses, the Remainder to the use of the right Heirs of the Husband. The Money is not laid out, the Husband dies without Issue; the Money decreed to the Plaintiff, being right Heir.

THat the Plaintiff is Brother and Heir as well of *John* as *Benjamin Knight*, and also Executor of the said *Benjamin*; and the said *John Knight* being seised of a Plantation in *Barbadoes* of 1000 *l. per Annum*, by his Will declared his debts to be paid, and gave several Legacies, and made his Brother *Benjamin* sole Executor, and gave him the residue of all his real and personal Estate, and the said *Benjamin* proved the Will, and afterwards a Treaty of Marriage was between the said *Benjamin* and Sir *Johnathan Atkyns*, on behalf of *Frances* the Daughter of Sir *Jonathan*, upon which Treaty it was agreed, that Sir *Jonathan* should give the said *Benjamin* 1500 *l.* as a Portion with the said *Frances*, and for a Joynture, in case *Frances* survived, *Benjamin* was to add 1500 *l.* and the said Sums to be laid out in a purchase of Lands, to be settled upon *Benjamin* and *Frances* for life, and for a Joynture for *Frances* in lieu of her Dower, and after their decease to the Issue between them, and for want of such Issue to the right Heirs of the said *Benjamin*, and until such purchase the said respective Sums of 1500 *l.* to be paid into the hands

hands of the Feoffees, and the increase thereof to the uses aforesaid; but in regard such a purchase could not be speedily found out, Sir *Jonathan* and *Benjamin* became mutually bound to each other by Bonds of 3000 *l.* penalty, with Condition reciting, That there being suddenly a Marriage to be had between the said *Benjamin* and *Frances*, and for settling a future Maintenance upon *Frances*, in case she survived, and upon the Issue between them. If therefore Sir *Jonathan*, his Heirs, Executors', &c. should pay as a Marriage portion with the said *Frances* into the hands of two Feoffees, to be joyntly appointed between them 1500 *l.* which (with the like Sum to be paid by *Benjamin*) was to be laid out upon good Security, real or personal, and the increase thereof for the uses aforesaid, and in case the whole was not provided within a short time, then so much as either party should deposit, and the Remainder with all convenient speed, then the said Bonds to be void: That such provision was sufficient, and in full of any Dower, the said *Frances* might have to *Benjamin's* Estate: That no Feoffees being appointed, the 1500 *l.* still remains at Interest in Sir *Jonathans* hands: And the said *Benjamin* for payment as well of his own as his Brother *Johns* debts and legacies, and to

D d

oblige

oblige his real and personal Estate for performance of the Marriage Agreement, did by Deed in 1681. convey unto Trustees all his Plantations, Houses, &c. upon Trust to himself for life, and after his death to satisfy the said Bond of 3000 *l.* for payment of 1500 *l.* to Sir *Jonathan*, for the future Maintenance of the said *Frances*, according to the said Marriage Agreement, and in full of Dower, and to do all things according as he by his last Will should direct: That the said *Benjamin* by Will, 10 Dec. 1681. therein reciting the Condition of the said Bond, gave his Wife 1000 *l.* unpaid of Sir *Jonathans* Bond, and his Trustees to pay 1500 *l.* with 500 *l.* he had received of Sir *Jonathan* in part of his Wives portion, which Sums made in all 3000 *l.* and was to be laid out in a purchase of Lands, to be settled to the uses aforesaid, and made *Hulkot* and *Fowler* Executors in Trust, to manage for the Plaintiff, whom he made his sole Executor, who afterwards took upon him the Execution of the said Will, and claims the said 3000 *l.* to be laid out in Lands, to be settled according to the said Marriage Agreement, which was in case *Benjamin* died without Issue, the said Lands so to be settled were to come to *Benjamins* right Heirs, and the Plaintiff is Instituted as Heir and Executor of *Benjamin*.
The

The Defendant *Pierce* confesses the Marriage Agreement and Bonds, as in the Bill, and that the Marriage between the said *Henry* and *Frances* took effect, and the said *Benjamin* is since dead, and that since his death the said Defendant *Pierce* hath married the said *Frances*, and is thereby intituled to the benefit of the Bond entred into by the said *Benjamin* to Sir *Jonathan*, and the Monies due thereon, and to the Third part of *Benjamins* Lands.

The Plaintiffs insist, That the said *Frances* dying without Issue, the Mony in Sir *Jonathan Atkyns* his hands, ought now to be paid to the Plaintiff.

This Court (upon reading the said Bond and Condition, and the Deed and Will of *Benjamin*) declared, That by the Marriage Agreement and Condition of the Bond, it was very clear that the said *Frances* having no Issue by the said *Benjamin* could only have an Estate for life, or the Interest of the Mony for her Maintenance, and that the Plaintiff is well intituled to have the said 3000*l.* paying the Defendant *Pierce* Interest for the 1500*l.* which the said *Benjamin*, the Plaintiffs Testator, was bound to lay out, and decreed accordingly.

Kettleby contra Lamb, 2 Jac. 2.
fo. 1064.

Monies to
be laid out
in Lands
for a Joyn-
ture by
Marriage
Articles.

THAT on a Treaty of Marriage be-
tween *Richard Kettleby* the Plain-
tiffs younger Brother, and the Defendant
Ann, now Wife of the Defendant *Atwood*,
Articles were entred into and made be-
tween *Thomas Laud*, Father of the Defen-
dant *Ann* of the first part, and the said
Richard Kettleby of the second part, and
the Plaintiff and others Trustees of the
third part, whereby the said *Lamb* Cove-
nanted to pay 1500 *l.* to the said Trustees
as a Marriage-portion with the Defendant
Ann his Daughter, and the said *Richard*
Kettleby Covenanted to pay 500 *l.* more,
which being 2000 *l.* was agreed to be laid
out in the purchase of Lands, to be settled
upon the said *Richard* for life, and after
on the said Trustees and their Heirs du-
ring the life of *Richard*, to preserve the
contingent Remainders, and after to the
use of the said *Ann* his Wife during her
life, for her Joyniture, and after to their
first, and so to their seventh Son of their
two Bodies and their Heirs successively,
and for want of such Issue to the Daugh-
ters, and for want of such Issue to the
right Heirs of the said *Richard Kettleby*
for ever; and that by the said Articles it

was

was agreed, that before such purchase could be made the said Trustees should place out at Interest the said 2000 *l.* and from time to time pay over the Interest to such person to whom the Lands are intended to be purchased was limited, as if the same had been purchased and settled accordingly, and there was a *Proviso* in the Articles, That if the said *Richard* died before a purchase should be made, leaving no Issue of his Body on the Body of the said *Ann* his intended Wife, and *Ann* survived him, that in that case the 2000 *l.* or so much thereof as was not laid out in Lands, should either be laid out in the purchase of Lands to be settled upon the said *Ann* for life, with Remainder to the right Heirs of *Richard*, or else Three parts thereof, the whole to be divided into Four parts of such Moneys as should be paid to the said *Ann* her Executors, &c. at her Election, so as she made such Election within six Months after the said *Richards* death, otherwise at the Election of *Richards* right Heir: That afterwards the Marriage took effect, and 1500 *l.* of the 2000 *l.* placed with the said *Lamb* by the Trustees, who paid the Interest thereof to the said *Richard Kettleby* during his life, and before the Mony was laid out in a purchase *Richard* died Intestate, leaving Issue one Daughter named *Ann*, who like-

wife died in a Month after the said *Richard*, whereupon the Right of the 2000 *l.* or Lands to be purchased therewith after the death of *Ann* the Wife accrued to the Plaintiff *Edward Kettleby*, as right Heir of the said *Richard Kettleby*; so to have the 2000 *l.* invested in Lands, and settled according to the said Articles, for the benefit of the Plaintiff, is the Plaintiffs Suit.

The Defendant *Atwood*, who hath married the said *Ann*, the Relict of the said *Richard Kettleby* insists, That the said *Ann* his Wife is Administratrix to *Richard* her first Husband and the said *Ann* her Daughter, and thereby well intituled to the personal Estate, and that according to the *Proviso* in the said Articles, the said *Ann* had made her Election to have 1500 *l.* of the 2000 *l.* to be at her own disposing, and that she was well intituled to the other 500 *l.* as Administratrix to *Richard* and *Ann* her said Daughter, and that the Marriage Articles being meerly for the benefit of the said Defendant *Ann Atwood* and her Issue; and the Plaintiff no way intituled under the Consideration thereof, there was no ground in Equity to compel a performance, so as to give the Plaintiff the Defendants portion.

This Case being heard by the Lord Keeper *North*, he declared, That the 2000 *l.* did

did belong to the Administratrix of the said *Richard Kettleby*, and ought not to be settled upon his Heir, and dismissed the Plaintiffs Bill, which dismissal being signed and inrolled, the Plaintiff brought his Bill of Review against the said Defendants, and for Error Assigned, that whereas it was declared by the said Lord *North*, that the 2000 *l.* did belong to the Administratrix of *Richard Kettleby*, and not to be settled upon his Heir: That the same ought to be Decreed to be laid out in Land, to be settled upon the said *Ann* only for life, Remainder to the Plaintiff as Right Heir of *Richard*, and his Right Heirs for ever, according to the uses of the Articles.

To which the Defendant pleaded and demurred, insisting, the same was obtained on good Grounds and Reasons, and farther insisted, that since the said Dismissal, and before the Bill of Review, the said *Lamb* had paid the said 1500 *l.* with other money, unto the Defendant *Atwood*, in Right of the said *Ann* his Wife, who was Administratrix to *Richard Kettleby*, and *Ann* the Daughter, and that in consideration thereof, the said Defendant *Atwood* had made a Settlement equivalent thereto, for a Joynture for his said Wife, and the Issue Male of their two Bodies, with a provision for Daughters, and that they had a Son then living, and prayed

the Judgment of this Court therein.

Which Plea and Demurrer, was argued before the Lord Chancellor *Jefferies*, which his Lordship over-ruled, and Ordered the Defendant to answer, and he would hear the Cause *ab origine*, at which hearing, the Defendant *Atwood* and his Wife insisted, That the Plaintiffs demand being only a Remote Remainder in Fee, as Right Heir of the Husband, was not so valuable in Interest, as for a Court of Equity to Decree a purchase to be made for the Sale thereof, and to take the money from the Wife and Administratrix, to make that purchase, when she ought to return the same as Assets, or howsoever 1500 *l.* of the money was her own Portion, and belongs to her by her Election within six Months, and though according to the strict Letter of the Articles her Husband *Richard Kettleby*, could not be said to die leaving no Issue, because he had a Daughter living at the time of his death, yet the Daughter dying within the six Months, allotted for the Wives Election, in case he had died leaving no Issue, there was great equity to extend the Construction of that Clause of the Articles, so far as to give her back her own 1500 *l.* portion.

The Plaintiff insisted, That such Remainders in Fee have been considered by this Court, and purchases decreed to be made

made and limited to such Right Heirs, and that the 2000 *l.* in this Case, cannot be Assets, and in like Cases had been so adjudged at Common Law; and in this Case the Articles have expressly provided, that the money should go as the Land ought to have gone, as if a purchase had been made therewith; and as for the pretence of the said Defendant *Anns* electing 1500 *l.* her power of electing did never arise, nor can her power be enlarged by this Court, beyond the express words of the Articles, nor is there reason for it in this case, in regard the Articles provided, that she shall have a Dower besides, and the said *Ann* by virtue of her two Administrations, hath a great personal Estate besides the 2000 *l.* in question.

This Court declared, That the 2000 *l.* Money to must go, as the Lands ought to have gone, be laid out in Land, in case a purchase had been made, and shall be applied as yet the Wife had no power to elect 1500 *l.* the Land part thereof, because her Husband died should have leaving Issue, and so her power of election should have never arose, nor did any Circumstances been, had it appear to his Lordship in this Cause, to in- been purchased. duce him to enlarge the Construction of the Articles, touching such power of electing, beyond the express words thereof, and decreed the said dismissal to be reversed, and that the Defendant *Atwood*, and *Ann* his Wife, do lay out the 2000 *l.* for

for purchasing Lands in possession in Fee simple, to be settled according to the intent of the Articles.

Trustees indemnified. And as for the Defendants the Trustees, in regard they relied upon the said dismission, Signed and Inrolled for their indemnity, in paying the said 2000*l.* to the said *Atwood* at his Wife, they are indemnified thereby.

Paggett contra Pagget, 3 Jac. 2.
fo. 2.

Blanks filled up after the Sealing and Execution of a Deed, yet good. **A** Deed of Revocation, and a new Settlement made by that Deed tho' after the sealing and execution of the said Deed Blanks were filled up in the said Deed, and the said Deed not read again to the party, nor resealed and executed, yet held a good Deed.

Smith contra Fisher, 3 Jac. 2.
fo. 641.

Money devised to one for life, with Limitations over, good. **T**hat *Susan Beale* by her Will in writing after several Legacies thereby given, gave all the rest and residue of her Estate, unbequeathed, which consisted mostly in ready money, to be put forth to Interest by her Executors, and one half of the Interest to be paid to the Plaintiff *Ann Cole* her Sister, during her life, and the other

other half of the Interest unto the Plaintiff *Ann Smith*, Daughter of the said *Ann Cole*, and after her Mothers decease, to have all the Interest during her life, and if the said *Ann Smith* died without Issue of her Body, then the principal of the Residue, should be equally divided between the Defendants, *Mary Cleever*, and *Elizabeth Farmer*.

The Question is, whether the devise over to the Defendant *Clever* and *Farmer* as aforesaid, was a good devise.

This Court declared, that the said Will was a good Will, as to the limitations over to the Defendant *Clever* and *Farmer*, and decreed the Executors to account accordingly.

Com' Dorsett contra Powle, 3 Jac. 2.
fo. 148. 599.

THIS Case is, where by the Deeds and Separate Agreement before Marriage, the Maintenance Countess of *Dorset* had an absolute power nance. to dispose of all the Personal Estate she had at the time of her Marriage with the Defendant, and the proceed thereof, and had by her Will and otherwise, well disposed of, and appointed the same to the Plaintiff, and this Court Ordered the Defendant to confirm the same; but as to the Rents and Profits of the Real Estate, upon

upon consideration of the several Clauses of the Deed, relating to the said Estate, and different penning of the same from the other Deeds, that concerned the afore-said personal Estate, his Lordship declared, that the said Countess had no power to dispose of the same.

By Indenture Tripartite, Dated 28th of June, 31 Car. 2. made between the Defendant Mr. Powle of the first part, Sir Thomas Littleton and Charles Brett Esquire of the second part, and the Countess of Dorset on the third part, reciting, That the said Countess was seized in Fee of several Manor Lands, Tenements and Hereditaments in *England*, and reciting, there was a Marriage intended between Mr. Powle and the Countess, it was agreed, that if the Marriage took effect, the Countess should during the Coverture, receive and dispose to her own use, and at her own Will and Pleasure, of all the Right and Title she had or claimed in the said Manour Lands and Premises, or in any other Manours or Lands of the Countess in *England*, and of all the Rents and Profits thereof, so as Mr. Powle his Executors. Administrators, and Assigns, were not to intermeddle nor have any Benefit or Advantage thereby in Law or Equity; but should joyn with the Countess from time to time, in the disposing thereof, as she should appoint, and

and the Defendant Mr. *Powle* thereby Covenanted, that if the Marriage took effect, Mr. *Powle* his Execuecutors or Administrators, without the consent of the Countess in writing, would not incumber the premisses, or receive the Rents and Profits to their own use; but from time to time would upon request, Authorize such persons after receiving the same for the Countess's separate use, as she should think fit, so as he might have nothing to do therewith, either in Law or Equity, and that upon request, he would make reasonable Leases of the premisses for such Considerations and Terms, and under such Covenants, as the Countess should think fit, and gave such Acquittances for the Rents, as should be requisite and convenient, and at the Charges of the Countess, and her said Trustees, should Commence and Prosecute any Suit necessary for the Recovery of any part of her Estates, and in defence of her Right there-to, and that the said Countess might dispose of the premisses, and receive the profits according to the true intent and meaning of the said Indenture Tripartite, without the Interruption of Mr. *Powle* his Executors, or any claiming under him or them.

And by another Indenture Tripartite, 28 June 31 Car. 2. between the Countess
of

of the first part, *Sir Thomas Littleton* and *Mr. Brett* of the second part, and *Mr. Powle* of the third part, reciting, that where as there was a Marriage to be had between *Mr. Powle* and the Countess, and that by agreement, she was to have and dispose to her own use, and at her pleasure, all her Jewels, Plate, Goods and Chattels, both Real and Personal, and the benefit thereof, so as *Mr. Powle* his Executors or Administrators, were not to intermeddle therewith, the Countess by *Mr. Powles* consent did make a Bargain and Sale to the said *Littleton* and *Brett*, of all her Jewels, Plate, Household-stuff, Money, Goods and Chattels, Real and Personal upon Trust, that they should dispose of the same, and the proceed thereof to such persons, and such uses as the Countess by any writing, or by her Will should appoint, so as *Mr. Powle* might not have any power or interest in Law or Equity, to Sell, Charge, or Dispose of the same, or any part thereof, and for want of such appointment upon Trust, to deliver the same, or such part thereof as should be undisposed of by the said Countess to her Executors or Administrators, and *Mr. Powle* by the last Deed covenanted not hinder the same, and also that they should be free from all debts and engagements of the said *Powle*; That *Mr. Powle* and the Countess inter-married,

married, and afterwards the said Countess according to the said agreement, and power as long as she lived disposed of all the Rents, and profits of her real Estate, and without *Powle's* intermeddling, That afterwards the said Trustees dying, Mr. *Powle* by Deed with the said Countess, transferred the said Trust to other Trustees, and also covenanted not to intermeddle, but the said premises to be solely in the power of the said Countess: And it was agreed, that the receipts of the Countess should be sufficient for the premises, or the preceed thereof, notwithstanding the Coverture: That the Countess by her self and the Trustees received the rents and profits of the premises, and disposed thereof without Mr. *Powle*: That the said Countess by Deed of appointment in 1682, and by her Will in 1684, whereof she made the Plaintiff the Earl of *Dorset* her Son Executor, to whom she (after some Bequests and appointments to other persons,) Bequeathed and appointed all the rest of her personal Estate, and also gave to him all her Monies and Rents, and all Arrears of Rents in her Steward and Tenants Hands, to all which the Plaintiff the Earl (the said Countess being dead) is intituled.

The Defendant *Powle* insists, that as to the Rents and Profits of the Real Estate,
he

he claims the same, and that he was so far from not intermeddling therewith, that he would not permit the Stewards to receive the Rents without Warrant from himself, and that he passed all the Accounts thereof, and rectified them after the Countess had signed them.

Feme Coverts disposing of her personal Estate, according to Agreement at Marriage, decreed good: But not as to the Rents and Profits of her real Estate.

This Court declared, There was an absolute Power in the said Countess of disposing all her personal Estate that she was possess of at the time of her Marriage, and the proceed thereof, and that she had pursuant to such Power well disposed of the same, and decreed the Defendant *Powell* to confirm the said Will and Appointment: But as touching the rent and profits of the real Estate, upon Consideration of several Clauses of the Deed relating to the said Estate, and different Penning of the same from the other Deeds that concerned the personal Estate, This Court declared, the said Countess had no power to dispose of the same, and all the Arrears thereof to be accounted for to the said Mr. *Powle*.

T H E

THE CASE

OF

The Duke of *Albemarle* ;

With the Arguments thereon.

Com' Mountague & al' contra Com' Bath & al', 4 W. & M. fo. 90.

THe Plaintiffs, after a Trial at Law ^{Revocation.} directed out of this Court, wherein Will. the Point in Issue was, Whether a Settlement was well made and executed, and a Verdict for the Defendant, that it was good and valid in Law ? They come into this Court to seek Relief upon the Equity reserved against the said voluntary Settlement, wherein was a power of Revocation by virtue of a Will afterwards made, the Question being, Whether in Equity the said Will was a Revocation of the Deed, tho' not strictly pursued?

E c

The

Bill.

The Bill was :

That *Christopher*, late Duke of *Albemarle* being seised of several Mannors, Lands and Tenements in several Counties having married the Duke of *Newcastle's* Daughter, and being possesst of a considerable personal Estate, frequently declared, That he would make ample provision for the Dutcheß (who then had but 2000 *l. per Annum* Annuity settled on her for a Joynture by *George Duke of Albemarle*, (upon her Marriage with Duke *Christopher*) for the support of her Dignity in case she survived him, and that if he should have no Issue Male, he would leave to her for her life at least 8000 *l. per Annum* out of his real Estate, and in pursuance of such his Resolutions, and likewise for the settling of the Remainder of his Lands upon his dying without Issue on Colonel *Monk* and others, made and published his last Will in writing, dated 1 July 1687. Whereby,

He gives to his Wife Coaches, Jewels, Plate, &c. and for advancing her living and support, if he have no Issue Male, and in full of her 2000 *l. per Annum* Rent-charge and Dower, he gives her his Lands in *Essex, Stafford, Lancaster, York, Lincoln, Surrey, Devon, Hertford, Middlesex, Berks* and *Southampton*, for her life, and if she accept the same, that she shall release the

2000 *l.*

2000 *l. per Annum* within Three years after his death, or else that Devise to be void. The Remainder of his Lands in *Berks* to *Sir Walter Clergyes* *pur vie*, and after in Tail Male, Remainder to his Cousin *Henry Monck* in Tail Male, Remainder to his own Right Heirs.

To *Beville Greenvile* (Son to the Earl of *Bath*) his Freehold Lands in *Surrey* and *Southampton* for life, and then in Tail Male, Remainder to his Cousin *Tho. Monck* *pur vie*, and then in Tail Male, Remainder to his Cousin *Henry Monck* in Tail Male, Remainder to his own right Heirs.

His Lands in *Devon* to Colonel *Thomas Monck* for life, and then in Tail Male, Remainder to his Cousin *Henry Monck* in Tail Male, remainder to his own right Heirs.

All his Lands in *Ireland* to his Cousin *Henry Monck* in Tail Male, with Remainder to his own right Heirs.

Provided, That if he have any Issue, all devises of any Sums of Mony (except for his Funeral, his Father's Monument, Almshouses and Legacies to his Executors) shall be void; and if he leave any Issue, the premisses devised to *Sir Walter Clergyes*, *Mr. Greenvile*, *Thomas* and *Henry Monck*, and their Issue, shall go to his Issue, (*viz.*) to his Sons successively in Tail Male, if Daughters, in Tail with Remainders to the said persons, as before

E e 2

Provided,

Provided, If he leave Issue Male, he deviseth to his Wife, as an Additional Joynture to her Rent charge, Lands in *Devon* and *Essex* for her life, and makes the Dutcheſs during her life, and in caſe of her death, the Dutcheſs of *Newcaſtle* Guardians of his Children he ſhall have.

And in caſe it happen, that Colonel *Thomas Monck*, or any Heirs males of his Body ſhall live to come and be in poſſeſſion of the premiſſes deviſed to him, he deſires they will live at *Potheridge*, the Ancient Seat of the Family, and deſires his Maſty to grant them the Title of Baron *Monck* of *Potheridge*, that it may remain in the Family in Memory of his Father and himſelf, and his Service his Father had the Honour to do the Crown in the Reſtauration, and makes the Duke of *Newcaſtle*, Lord *Cheney*, *Jarvis Peirpoint*, Sir *Walter Clergyes*, Sir *Thomas Stringer*, *Henry Pollexfen* Eſq; and others, Executors.

That the Duke gave direction to *Henry Pollexfen* Eſq; to make this Will, and when drawn, was fully approved of by the Duke upon mature deliberation: Which Will being in Three parts he carefully lock'd up, and after leaving Two parts of his Will to two perſons and kept the Third, he went to *Jamaica*.

That

That the Duke, when in *Jamaica*, heard Colonel *Thomas Monck* was dead in *Holland*, sent to the Earl of *Bathe*, Sir *Tho. Siringer* and others, to send over for *Christopher Monck*, the Colonels eldest Son, to Educate him so as to fit him to bear the Character of one to whom he intended the greatest part of his Estate, if he died without Issue.

In *September* 1688. the Duke sickned in *Jamaica*, and there again published his said Will, and declared that if he died, the Box and Will should be delivered to the Dutcheß, and died in *October* following.

That the Dutcheß at her Return from *Jamaica* found, that the Earl of *Bathe* set up another Will; dated 3. *Aug.* 1675. whereby the Remainder of the greatest part of the Estate was given to the Earl of *Bathe* and his Heirs; and likewise a Settlement by way of Lease and Release, in corroboration of that Will, by which he seeks to avoid and frustrate the Will of 1687. That the Duke sent to the Earl of *Bathe* for the Will of 1675. (if any such) to have it delivered to him, that he might make another Will: That the Will of 1687. was Sealed at Sir *Robert Claytons* the same day after other Writings had been by him sealed to the Lord Chancellor *Jeffreys* of some Lands sold to him; and that the Dutcheß, nor any of her

Relations ever knew or heard of the said Deeds, till after the Dukes death, nor known to Sir *Thomas Stringer*, who was the Dukes standing Councel, and the Plaintiffs farther insist, if there were such Deed, yet it ought not to avoid or impeach the said last Will, though the power of Revoking the same, was not literally pursued, yet the same in Equity, ought to be taken as a Revocation, and the rather, for that at the making of the Will, the Duke remained owner of the Estate, and he lookt upon himself so to be, for that he had since the said pretended Deeds, sold some part of the Estate to Chancellor *Jefferies*, without any Revocation, and the Earl of *Bath* paid no valuable Consideration, and that he ought to be protected in the enjoyment of the personal Estate, and the Specifick Legacies devised to her, in the Will of 1687. tho' the Will of 75. (if any such be) was intended by the Duke, principally to hinder the discent to his next Heir; and the Deeds (if such there be) were for the same purpose, and that tho' the Deed recites to confirm the last Will of 75. yet does in several places controul it, and alter it, whereby and by the extraordinary strange and unprecedented Declarations, Provisoos and Covenants therein, the Plaintiff believes, the Deeds were never executed by the Duke, or if so, that he

he was surprised therein, and pray Relief in the premisses.

To this the Defendant makes Answer, Answer.
and sets forth the Will of 1675. whereby the greatest part of the whole Estate was given to the Earl and his Heirs, and sets forth the Considerations of his so doing, as Antient Kindred, and Esteem between Duke George, and the Earl of Bath, and several Services and good Offices that he had done the Family, and likewise sets forth, that being well satisfied with such his disposition of his Estate, and finding that he had been often importuned to alter the same, and fearing lest the repeated Practises and Arts attempted against such his Disposition, might some time or other surprise him into a Compliance, Consulted with Sir William Jones and other his Counsel, how to Obviate such practises, and to settle his Estate in such manner, as that it might not be avoided, although for his ease, he should at any time seem to yield to the Sollicitations of his near Relations, whereupon in Anno 1681. the Duke makes a Settlement, wherein he begins: That for the assuring of the Honour, Manours, &c. upon a Person of Honour, &c. and for the Corroborating and Confirming the said Will of 75. and to the end, that no pretended last Will should be set up by any Person whatsoever; and for the Natural Affection

Proviso.

that he beareth to the Earl of *Bath*, &c. grants by Lease and Release, several Manors, Lands and Tenements, &c. some in Possession, and some in Remainder, upon the Earl of *Bath* in Fee, and so to *Walter Clergies*, &c. in which Deed there was this *Proviso*: That if the Duke shall at any time during his life, be minded to make void the said Indenture, or any Estate therein contained, or to dispose of the said Honours, Manours and Lands in any other sort, or to any other Person or Persons, and his or their Heirs, or for any other purposes, and the same his Mind, Intent and purpose, should signifie and declare in Writing, under his Hand and Seal in the presence of six Credible Witnesses, (three whereof to be Peers of this Realm) and should pay to his Trustees, or any of them, the Sum of Six pence, with intent or purpose to frustrate or make void the said Indentures, That then and not otherwise, and immediately after such Signification, Declaration, and payment or tender of payment of 6 *d.* as aforesaid, the said Use and Uses, Estate and Estates, Trusts, Confidence, Intents and Purposes, and all and so much of the premisses, whereof the Duke should make such Signification or Determination, should cease Determin, and be utterly void to all Intents, Construction and Purposes whatsoever,

foever, and that then, and from thenceforth, it should and might be lawful for Duke by such Writing, or any other Deed or Writing Subscribed, Sealed and Testified as aforesaid, to declare new or other Use or Uses, Trust or Trusts of all or so much of the premisses, whereof the Duke should make any such Signification or Declaration, or otherwise to dispose of the premisses, or any part thereof at his Free Will and Pleasure, any thing in the Deed to the contrary notwithstanding.

And for the further prevention of the ^{Covenant.} mischief and Inconveniences that might attend any future or suddain Surreptitious Will, which might at any time defeat his Recited Will (which he declares to have made upon Mature Deliberation) Covenants for himself, his Heirs, Executors and Administrators with the Duke of Newcastle, and (his Trustees) that he would not Revoke, Annul or Discharge the said Will, or any the Legacies thereby devised, unless by some instrument Sealed and Executed in the presence of many, and such Witnesses, as are in the said *Proviso* specified, declared and described for Credible Witnesses within the said *Proviso*, according to the Intention, Literal Sense, and true meaning of the Duke expressed in the said *Proviso*.

He denies the said Deed was obtained by

by Surprise; but that the Duke executed the same in the presence of many Credible Witnesses, and that the Duke left the Deed and Will in his keeping.

And as to so much of the Bill, as requires the Defendant to give an account of what part of the said Dukes Personal Estate came to the Defendants Hands, he is Advised by the Rules of this Honourable Court, that he is not Compellable to Answer thereunto, for that it appears by the Plaintiffs Bill, that at the time of the Exhibiting thereof, the Plaintiffs were not intituled to make such demand, or to have such account, it thereby appearing of their own shewing, that they have not proved the said Will of 87. but that the same was, and still is under Controversie undetermined in the *Prerogative Court*, whereof, or as to that part of the Bill he demurs.

As to the Objection, That it was a Concealed Will and Deed, the Defendants insist, that it was done silently, but the Duke would have it kept Secret, that he might be free from Trouble and Importunity.

And they insist, That as to the last Will of 85. That the Duke Advised with Council, to know whether a Will made after the Settlement, would avoid or impeach the Settlement, was answered, that it would

would not, and that *Proviso* must be strictly pursued, whereupon he was well satisfied, and that the said Deed ought to be supported, and not set aside in Equity, being made upon such Meritorious Consideration of Blood, Merit, &c.

The Plaintiffs insist, That the said Deed (if any such) being a Voluntary Settlement only, that the Will of 87. is a good Revocation thereof, in a Court of Equity. So that the great Question was, if the said Deed (it being found to be valid at a Trial at Law) is Revoked by the said last Will, according to Equitable Intention or Construction.

This Cause having been Debated and Argued several times by Learned Council, and afterwards by three Judges, (viz.) my Lord Chief Justice *Holt*, the Lord Chief Justice *Treby*, and Mr. Baron *Powell*, it was agreed by them, that the Deed was a good Deed, well executed, and not Revoked by the Will of 1687.

The Lord Chief Justice *Treby's* Argument in short was thus :

In 1675. the Duke made his Will, and declares in respect that the Earl of *Bathe* was his Kinsman, and had done many Kindnesses to him and his Family, the Earl should have the greatest part of his Estate, and gives several Legacies to one

Monck;

Monck; and then he makes a Deed of Settlement in 1681. tho' the Limitations by the one and the other differ; but it is not made to revoke, but to confirm the Will. Both the Will of 1675. and Deed of 1681. do agree in giving the greatest part of the Estate to the Earl of *Bathe*, but the *Proviso* in the Deed makes the dispute; and then there is a Will of 1687. wherein a larger Estate is given to the *Dutchess* and Colonel *Monck*, &c. and desires the Honour of *Potheridge* may be established on the *Moncks*. The Plaintiffs Bill is to establish the Will of 1687. and set aside the Deed of 1681. and Will of 1675. And the Deed on the Hearing of the Cause was directed to be tried, and a Verdict for the Defendant, and the Plaintiff hath acquiesced under it, and so this Deed must be taken as a good Deed and Conveyance without any suspicion, for the Right was tried, and the whole Contents tried, and if it were good at Law, whether there be cause to set it aside in Equity is the Question?

He was of Opinion, That the Deed was a good Deed, and ought not to be impeached in this Court.

The Plaintiffs Arguments against the Deed are:

1. Surprise.
2. Concealment.

3. The

3. That the Will of 1687. is a Revocation in Equity.

4. That there is a Trust.

As to the Surprize: He observed, they did not make use of the word *Fraud* in gaining the Deed, but that it was something put upon the Duke for want of deliberation. He said, he was not satisfied that there was any Surprize on the Duke, for he was not languishing at that time under any Sickness, but it was done and executed in good Company and after dinner, with great Consideration both before and at that time. They pretend a want of Circumstances in the execution, whereas Sir *William Jones* was advised with before the Deed sealed, and present at the time of the sealing: Several other Circumstances were insisted on by the Plaintiffs, but none are sufficient to set aside the Deed. The Deed of 1681. and the Will of 1675. are not inconsistent, tho' they differ in the limitation of the Estate: But by both, the greatest part of the Estate is given to the Earl of *Bathe*. Tho' they could not find Instructions for drawing the Deed, tho' the Deed was not found to be read, tho' no Counterpart was sealed; yet none of these by any of the Presidents have either been singly or altogether allowed, as Causes to set aside a Deed in Equity. He was of Opinion that the Deed doth confirm the Will.

Will of 1675. in the settling and assuring the Estate, part on the Dutcheſs and part on the Earl, and as to particular limitations the Duke might alter his Mind from the Will, and do it according to the Deed.

The Third thing they inſiſt on by way of Surprize is, That it was done contrary to the Dukes Intention: Whereas the Defendants have proved, that it was according to his Intention, and the other ſide ſay not, neither before nor after the making of the Deed: For that there were ſeveral Wills made by Duke *George*, and not a word of any Limitation of any Estate to the Earl of *Bathe*. Which is answered by the other ſide, That the Wills are in few words, and thereby all given to Duke *Chriſtopher*, and not any provision made for any younger Son or Daughter; neither in theſe Wills, nor in the Will of 1675. is there any thing given to the Father of this *Monck*.

Another Objection, That the Duke never intended any thing to Sir *Walter Clergies*, for that he was fallen into his diſpleaſure, and what is given is a remote Remainder; but there were Proofs of continued Kindneſs to the Earl of *Bathe*. And the greateſt proof that there was no Surprize, was the preſence of Sir *William Jones* at the execution of the Deed, who
was

was of great Ability and Integrity , and would not be guilty of a surprizing , and he was satisfied that there was nothing but fair dealing in the execution of the Deed.

As to the Will of 1687. perhaps it might be intended, not to give this Estate to the Earl, and that there was great Advice taken on that Will.

But what was the meaning of the Duke in making the Will of 1687. if it must signifie nothing ?

The truest Answer that hath been given is, That he Advised whether a Will would revoke the Deed , and when he understood that it would not , but that he had put all out of his power (except by a strict Revocation,) then he gratified the continued Importunities of his near Relations, and endeavours by that to render himself easy ; so he conceived the Deed well executed, and is pursuant to the Will of 1675. and cannot be set aside on the point of Surprize.

The next point insisted on is Concealment, and they insist on a Clause in the Earls Answer, where the Duke sent for the Deed, in Order to make a new Settlement : The Will he might have Revoked without the Deed ; but as the Plainiff saith, the not doing of it was a Concealment, and the Argument is good , if the fact

fact were true. But its not so, for it doth not appear, that he ever intended to Revoke the Deed ; and both the Will of 75. and the Deed of 81. were delivered into the Earls Hands, just before the Duke went abroad, and the Concealment was not from the Duke, but the Dutchess, and the Presidents Cited of *Clare contra Com' Bedford*, and *Raw contra Pott*, come not up to this Case.

The next point insisted on is Revocation. The Will of 1687. (say the Plaintiffs) is a Revocation in Equity, though there was not the Quality or Number of Witnesses described and limited in the *Proviso*. Its no Revocation, neither was it intended so, the Duke wrote a Letter to the Earl, that he had done him no wrong, and he left the Keys with him, and imployed the Earl in selling the *Cockpitt* and *Albemarle House*, and the Duke continued in the same mind to *Monck*, and Sir *Walter Clargies*, and there seemed no reason why he should not be of the same mind as to the Earl, and there was a great Provision made for the Dutchess by the Will and Deed, but not a word of Mr. *Monck* in either, but only in this last Will. Where there are two voluntary Conveyances, he that hath the Estate by Law, shall hold it. Where a Party shall be relieved, where there is a defect, they shall be relieved, where there

is a defect, they shall be relieved, where there is a deceit or falsity, and the Presidents are, that they have been relieved in such Cases, where it is to pay Debts, or to provide for Children, several Presidents have been Cited, as *Price and Green, Ferrers and Thannett, Webb and Webb*, temp. *Eliz.* Doctor *Hamilton* contra *Maxwellin*, 1655. *Bowman* and *Tates*, *Wallis* and *Coate* contra *Gryme*, *Thwaytes* contra *Deg*, *Arundell* contra *Phillpott*.

As for the Trust, nothing was said by him of it, for it cannot be presumed, that there was any Resulting Trust, for that was to undoe what he had done before. The Defendants are in possession by a Verdict upon the Deed, and there is no reason to disturbe them.

Lord Chief Justice *Holt*, This Case depends on a Will of 1675. and a Deed of 1681. and a Will of 1687. and the question is, whether the Will of 1687, doth Revoke the Deed of 1681. it being not pursuant to the power: He was of the same Opinion with Baron *Powel*, and Lord Chief Justice *Treby*. The Deed is a good Deed, and so all the Evidences and Circumstances relating to the Deed, ought to be taken to be true (*viz.*) that Sir *William Jones* was advised with in the Draught, and was present as a Witness, and that the Will of 1687. is a good Will; but not to be re-

F f

lieved

lieved against the Deed of 1681. which must be taken to be a good Deed, and he reduced what he had to say to four Heads.

1. Of the Frame and Manner of the Deed.

2. Whether on the Evidence, the Deed were unduly obtained.

3. Of the Circumstances and Conditions of the Persons.

4. Of the Person of the Duke himself, and the Circumstances he was in, when he made his Will of 1687. for whether the Plaintiffs shall be relieved against the Deed, is the Question.

As to the first, Its said the Will of 75, and the Deed, make but one Conveyance, and that is fetcht from Law; for at Law, a Fine and Recovery and Deed to Lead the Uses, are but one Conveyance. So as to the first from the Contradictions and Misrecitals in the Deed, which have been insisted on, there is no Cause to relieve against the Deed.

As to the second, on the matter of obtaining the Deed, he said, he could not find any undue obtaining of the Deed, but that Sir *William Jones* his Hand was in the *Proviso* of the said Deed, and that the Deed was not executed by a Surprise, for the Dukes Council was present at the execution of the Deed, and here is no fraud

to set it aside. As to the Case of *Winn* and *Bodvile*, which has been Cited, there was a great fraud and practise; but there is no fraud or circumvention here, but the Deed is fairly obtained, and there is nothing but a presumptive Evidence against it, which ought not in Equity, to be an Evidence against the Deed, so as there appears no Evidence, that the Earl surprized the Duke, or that the Duke was surprized.

As to the third point, touching the Circumstances and Conditions of the Persons. The Earl was a near Relation, and had done many kindnesses to the Duke, and his Family, and was especially intrusted by him; and though the other Persons that claim by the Will of 1687. may be of Relation to him, yet he that hath the best Title, hath the right. And so it is in the Case of Persons, where both claim under two voluntary Conveyances.

As to the fourth and last point, touching the Circumstances the Duke was in, when the Will was made, the Duke when he made the Will, was under a Restraint by the Deed of 1681. for his power was executed, and the Duke had restrained himself. And the Court of Equity hath no power to examine into the Reasons and Considerations for doing it, and there may

be Reasons for a Wise Man to Restrain himself, for he may not know what surprize may be put upon him ; and as there may be reason for it, so it shall be presumed there was good reason. Further, there is no Evidence of an Intention in the Duke to execute the power, for he had an opportunity to have done it ; and because a Man may one way dispose of his Estate, that therefore he may do it any way, is strange ; and if that may be done, it will overthrow all the Conveyances that are made.

They on the other side pretend, the Duke had forgotten the Deed. It was made but in 1681. and well attested by Credible Witnesses ; and if he had forgotten it, his Council had an Abstract of the Deed ; and because a Man had forgot a Deed, that ought not to be a cause in a Court of Equity to set that Deed aside, for Memory may fail, but a Deed is *Permanent*, so there ought to be no relief against the Earl, and those that claim by the Deed of 1681.

Lord Keeper: There be three Suits in this Court, the Dutches her first Eill is to set aside the Deed of 1681. And the second Bill by the *Moncks* much to the same effect, and on the same Evidence. And the third Bill by the Earl, complaining of the Will of 1687. On the hearing of the Causes the 8th day of July 1691. before the then Lords Commissioners,

sioners, and on a Trial directed, touching the Validity of the said Deed of 1681. there was a Verdict for the Deed, and this Verdict hath not been stirred. The Cause comes now to be heard on the Equity reserved on the whole matter: I declare the Deed doth stand Unrevoked at Law, and the Defendant the Earl of *Bathe* is well intituled under that Deed, for here are no Creditors nor Purchasers, or any Children to be provided for, and the benefit that comes to the Earl, is the *Essex* and the *Northern Estate*.

The Court did declare, that there is not any sufficient matter in Equity appears to set aside the Deed, therefore dismiss the Bill of the Earl of *Mountague*, and *Christopher Monk*, so far as they seek relief to set aside the said Deed of 1681. and as to the other matters, Equity to be reserved.

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